No. 94-1592

(5)

Supreme Court, U.S.
FILED
AUG 4 1995
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

BROTHERHOOD OF LOCOMOTIVE ENGINEERS and
UNITED TRANSPORTATION UNION,
Petitioners,

v.

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY, *et al.*,
and
FEDERICO PENA, *et al.*,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit**

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED MARCH 27, 1995
CERTIORARI GRANTED JUNE 19, 1995

BEST AVAILABLE COPY

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UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 93-1505, 93-2378 and 93-2712
Consolidated

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, BURLINGTON NORTHERN RAILROAD COMPANY, CONSOLIDATED RAIL CORPORATION, *et al.*,

Petitioners

v.

FEDERICO PENA, Secretary of Transportation, S. MARK LINDSEY, Acting Administrator, Federal Railroad Administration, FEDERAL RAILROAD ADMINISTRATION, *et al.*,

Respondents

and

BROTHERHOOD OF LOCOMOTIVE ENGINEERS and UNITED TRANSPORTATION UNION,

Intervening-Respondents

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
	Case No. 93-1505
3/2/93	Petition for Review docketed. Filed Orig. and 3c of petitioner's Petition for Review. [93-1505] [463891-1] Appearance form due on 4/1/93 for Lawrence M. Mann, for Stuart M. Gerson, for S. Mark Lindsey, for Rosalind A. Knapp, for Brenda J. Council, for Ronald M. Johnson, for Robert S. Bogason, for William P. Stallsmith, for Ronald A. Lane, for James D. Tomola, for Andrew P. Cocoran, for John B. Rossi, for Lawrence M. Stroik, for Guy Vitello. Agency record or cert. list due on 4/12/93 for Federico Pena, for Department Transport, for S. Mark Lindsey, for Federal Railroad. (carl) [93-1505]

DATE	PROCEEDINGS
3/2/93	Filed clerk's copy of notice of service on counsel for respondent. [93-1505] [463891-1] (carl) [93-1505]
3/15/93	Added attorney John F. Daly and Malcolm L. Stewart per appearance form for Respondents Federico Pena, Mark Lindsey, Federal Railroad, and DOTP. (kolb) [93-1505]
3/15/93	Appearance form filed for Respondents Federico Pena, S. Mark Lindsey, Federal Railroad, DOTP by attorneys Malcolm L. Stewart, John F. Daly. [93-1505] [463891-1] (kolb) [93-1505]
3/16/93	Added attorney Mark V. Holden per appearance form for Petitioners Atchison, Topeka, et al. (kolb) [93-1505]
3/16/93	Appearance form filed for Petitioners Atchison, Topeka, et al., by attorneys Ronald M. Johnson and Mark V. Holden. [93-1505] [463891-1] (kolb) [93-1505]
3/16/93	Appearance form filed for Petitioner Atchison, Topeka by attorney Guy Vitello. [93-1505] [463891-1] (kolb) [93-1505]
3/16/93	Added attorneys Lawrence M. Stroik, Thomas J. Knapp, and W. Douglas Werner per appearance form for Petitioners Atchison, Topeka, et al. (kolb) [93-1505]
3/16/93	Appearance form filed for Petitioners Atchison, Topeka, et al. by attorneys Thomas J. Knapp, W. Douglas Werner, and Lawrence M. Stroik. [93-1505] [463891-1] (kolb) [93-1505]
3/17/93	Filed motion by Brotherhood of Locomotive Engineers and United Transportation Union to intervene. [468947-1] [93-1505] (carl) [93-1505]
3/17/93	Added attorney Steven M. Weisbaum per appearance form for Notice-Only (Brotherhood of Locomotive Engineers, United Transportation Union. (kolb) [93-1505]

DATE	PROCEEDINGS
3/17/93	Appearance form filed for Notice-Only (Brotherhood of Locomotive Engineers, United Transportation Union) by attorneys Steven M. Weisbaum, Lawrence M. Mann. [93-1505] [463891-1] (kolb) [93-1505]
3/18/93	Added attorneys David Herbert Kasminoff, Daniel C. Smith, and Billie Ann Stultz per appearance form for Respondent Federal Railroad. (kolb) [93-1505]
3/18/93	Appearance form filed for Respondent Federal Railroad by attorney Billie Ann Stultz, Daniel C. Smith, David Herbert Kasminoff. [93-1505] [463891-1] (kolb) [93-1505]
3/25/93	ORDER issued GRANTING motion to intervene, and the Brotherhood of Locomotive Engineers and United Transportation Union may participate in this appeal as intervening respondents. [468947-1 [93-1505] (carl) [93-1505]
4/8/93	Filed motion by Petitioner Atchison, Topeka, Petitioner Burlington Northern, Petitioner Consolidated Rail, Petitioner CSX Transportation, Petitioner IL Central Railroad, Petitioner Norfolk Southern, Petitioner Norfolk & Western, Petitioner Southern Pacific, Petitioner Union Pacific to abate petition for review. [476166-1] [93-1505] (carl) [93-1505]
4/13/93	ORDER: Filed clerk's notice to Federal Railroad, Brohd Locomotive, United Transportatio[*] to file O&3 copies of response to MOTION TO HOLD PETITION FOR REVIEW IN ABEYANCE. [93-1505] [477647-1] Response due 4/20/93 for United Transportatio, for Brohd Locomotive, for Federal Railroad (carl) [93-1505]

[*] "Transportation" is misspelled throughout the Relevant Docket Entries.

DATE	PROCEEDINGS
4/20/93	Filed Respondent Federico Pena, Respondent S. Mark Lindsey, Respondent Federal Railroad, Respondent DOTP response to Petitioner Atchison, Topeka, Petitioner Burlington Northern, Petitioner Consolidated Rail, Petitioner CSX Transportation, Petitioner IL Central Railroad, Petitioner Norfolk Southern, Petitioner Norfolk & Western, Petitioner Southern Pacific, Petitioner Union Pacific motion to hold the briefing schedule IN ABEYANCE. [480350-1] Document [477647-1] [93-1505] [480350-1] (carl) [93-1505]
4/20/93	Filed Respondent Federico Pena, Respondent S. Mark Lindsey, Respondent Federal Railroad, Respondent DOTP response to Petitioner Atchison, Topeka, Petitioner Burlington Northern, Petitioner Consolidated Rail, Petitioner CSX Transportation, Petitioner IL Central Railroad, Petitioner Norfolk Southern, Petitioner Norfolk & Western, Petitioner Southern Pacific, Petitioner Union Pacific motion to abate case. [480359-1] Document [477647-1] [93-1505] [480359-1] (carl) [93-1505]
4/21/93	ORDER issued GRANTING motion to abate case and the petition for review is HELD IN ABEYANCE pending a further court order. Petitioners shall file, on or before June 15, a status report advising the court whether the agency has issued a decision on petitioners "petition for interpretation," and its impact on this appeal. [476166-1] [93-1505] (carl) [93-1505]
4/21/93	Filed intervening respondents United Transportation Union and Brotherhood of Locomotive Engineers response to Petitioner Atchison, Topeka, Petitioner Burlington Northern, Petitioner Consolidated Rail, Petitioner CSX Transportation, Petitioner IL Central Railroad, Petitioner Norfolk Southern, Petitioner Norfolk & Western, Petitioner Southern Pacific, Petitioner Union Pacific motion to abate case. [480756-1] Document [93-1505] [480756-1] (carl) [93-1505]
6/16/93	Filed status report by Petitioner Atchison, Topeka, Petitioner Burlington Northern, Petitioner Consolidated Rail, Petitioner CSX Transportation, Petitioner IL Central Railroad, Petitioner Norfolk Southern, Petitioner Norfolk & Western, Petitioner Southern Pacific, Petitioner Union Pacific. [93-1505] [500094-1] (fran) [93-1505]
6/16/93	Order re: Status report of 6/16/93. Counsel for Petitioner Atchison, Topeka, Petitioner Burlington Northern, Petitioner Consolidated Rail, Petitioner CSX Transportation, Petitioner IL Central Railroad, Petitioner Norfolk Southern, Petitioner Norfolk & Western, Petitioner Southern Pacific, Petitioner Union Pacific are ordered to file a further status report. [463891-1] [93-1505] Status report due on or before 7/16/93 for Union Pacific, for Southern Pacific, for Norfolk & Western, for Norfolk Southern, for IL Central Railroad, for CSX Transportation, for Consolidated Rail, for Burlington Northern, for Atchison, Topeka (fran) [93-1505]
6/24/93	ORDER: GRANTING motion to abate case [500593-1] in 93-2378 The court orders these appeals CONSOLIDATED for purposes of briefing and disposition and further proceedings in this matter are HELD IN ABEYANCE. Petitioners shall file, on or before 7/16/93, a status report advising this court whether the agency has issued a decision on petitioners' Petition for Interpretation, and, if so, its impact on this appeal. [93-1505, 93-2378] [500593-1] (carl) [93-1505 93-2378]
6/24/93	[93-1505, 93-2378] [463891-1] Status report due on or before 7/16/93 for Union Pacific in 93-1505,

DATE	PROCEEDINGS
	for Southern Pacific in 93-1505, for Norfolk & Western in 93-1505, for Norfolk Southern in 93-1505, for IL Central Railroad in 93-1505, for CSX Transportation in 93-1505, for Consolidated Rail in 93-1505, for Burlington Northern in 93-1505, for Atchison, Topeka in 93-1505, for Union Pacific in 93-2378, for Southern Pacific in 93-2378, for Norfolk & Western in 93-2378, for Norfolk Southern in 93-2378, for IL Central Railroad in 93-2378, for CSX Transportation in 93-2378, for Consolidated Rail in 93-2378, for Burlington Northern in 93-2378, for Atchison, Topeka in 93-2378, per 6/24/93 order. (carl) [93-1505 93-2378]
7/16/93	Filed status report by Petitioner Union Pacific in 93-1505, Petitioner Southern Pacific in 93-1505, Petitioner Norfolk & Western in 93-1505, Petitioner Norfolk Southern in 93-1505, Petitioner IL Central Railroad in 93-1505, Petitioner CSX Transportation in 93-1505, Petitioner Consolidated Rail in 93-1505. [93-1505] [509874-1] (odea) [93-1505]
7/21/93	ORDER: The court orders these appeals [93-1505, 93-2378, 93-2712] CONSOLIDATED for purposes of briefing and disposition. Record preparation and briefing on the merits shall proceed in accordance with Fed. R. App. P. 17 and 31. [510209-1] (patb) [93-1505 93-2378 93-2712]
8/25/93	Certified List filed by Respondent Federal Railroad in 93-1505, Respondent TRAN in 93-2378, Respondent Federal Railroad in 93-2712. [93-1505, 93-2378, 93-2712] [521232-1] The first brief in this appeal is due 10/4/93 for Atchison, Topeka in 93-1505, for Burlington Northern in 93-1505, for Consolidated Rail in 93-1505, for CSX Transportation in 93-1505, for IL Central Railroad in 93-1505, for Norfolk Southern in 93-1505, for

DATE	PROCEEDINGS
	Norfolk & Western in 93-1505, for Southern Pacific in 93-1505, for Union Pacific in 93-1505, for Union Pacific in 93-2378, for Southern Pacific in 93-2378, for Norfolk Southern in 93-2378, for Norfolk & Western in 93-2378, for Atchison, Topeka in 93-2378, for Burlington Northern in 93-2378, for Consolidated Rail in 93-2378, for CSX Transportation in 93-2378, for IL Central Railroad in 93-2378, for Southern Pacific in 93-2712, for Norfolk Southern in 93-2712, for Norfolk & Western in 93-2712, for IL Central Railroad in 93-2712, for CSX Transportation in 93-2712, for Consolidated Rail in 93-2712, for Burlington Northern in 93-2712, for Atchison, Topeka in 93-2712. (eric) [93-1505 93-2378 93-2712]
10/5/93	Brief deficiency letter sent to Petitioner Union Pacific in 93-1505, Petitioner Southern Pacific in 93-1505, Petitioner Norfolk & Western in 93-1505, Petitioner Norfolk Southern in 93-1505, Petitioner IL Central Railroad in 93-1505, Petitioner CSX Transportation in 93-1505, Petitioner Consolidated Rail in 93-1505, Petitioner Burlington Northern in 93-1505, Petitioner Atchison, Topeka in 93-1505, Petitioner IL Central Railroad in 93-2378, Petitioner CSX Transportation in 93-2378, Petitioner Consolidated Rail in 93-2378, Petitioner Burlington Northern in 93-2378, Petitioner Atchison, Topeka in 93-2378, Petitioner Norfolk & Western in 93-2378, Petitioner Norfolk Southern in 93-2378, Petitioner Southern Pacific in 93-2378, Petitioner Union Pacific in 93-2378, Petitioner Atchison, Topeka in 93-2712, Petitioner Burlington Northern in 93-2712, Petitioner Consolidated Rail in 93-2712, Petitioner CSX Transportation in 93-2712, Petitioner IL Central Railroad in 93-2712, Petitioner Norfolk & Western in 93-2712, Petitioner Norfolk Southern in 93-2712, Petitioner Southern Pacific in 93-2712. [510209-1]

DATE	PROCEEDINGS
	[93-1505, 93-2378, 93-2712) (duda) [93-1505, 93-2378, 93-2712]
10/12/93	Filed instanter motion by Petitioner Union Pacific in 93-1505, Petitioner Southern Pacific in 93-1505, Petitioner Norfolk & Western in 93-1505, Petitioner Norfolk Southern in 93-1505, Petitioner IL Central Railroad in 93-1505, Petitioner CSX Transportation in 93-1505, Petitioner Consolidated Rail in 93-1505, Petitioner Burlington Northern in 93-1505, Petitioner Atchison, Topeka in 93-1505, Petitioner IL Central Railroad in 93-2378, Petitioner CSX Transportation in 93-2378, Petitioner Consolidated Rail in 93-2378, Petitioner Burlington Northern in 93-2378, Petitioner Atchison, Topeka in 93-2378, Petitioner Norfolk & Western in 93-2378, Petitioner Norfolk Southern in 93-2378, Petitioner Southern Pacific in 93-2378, Petitioner Union Pacific in 93-2378, Petitioner Atchison, Topeka in 93-2712, Petitioner Burlington Northern in 93-2712, Petitioner Consolidated Rail in 93-2712, Petitioner CSX Transportation in 93-2712, Petitioner IL Central Railroad in 93-2712, Petitioner Norfolk & Western in 93-2712, Petitioner Norfolk Southern in 93-2712, Petitioner Southern Pacific in 93-2712 to file first brief in agency appeal. [536122-1]. 15c petitioner's brief 10c appendix tendered. [536122-1] [93-1505, 93-2378, 93-2712] (roxa) [93-1505 93-2378 93-2712]
10/12/93	ORDER issued GRANTING instanter motion to file first brief in agency appeal. [536122-1] in 93-1505, 93-2378, 93-2712 The clerk of this court is directed to file instanter the tendered copies of the petitioners' consolidated brief. [93-1505, 93-2378, 93-2712] [536122-1] 1. The second agency brief is due 11/12/93 for Federico Pena in 93-1505, for TRAN in 93-1505, for S. Mark Lindsey in 93-1505, for Federal Railroad in 93-1505, for Brohd Locomotive in 93-1505, for United Transportatio in 93-1505, for TRAN in 93-2378, for Brohd Locomotive in 93-2378, for United Trans Union in 93-2378, for Federal Railroad in 93-2712, for Grady C. Cothen in 93-2712, for TRAN in 93-2712, for Federico Pena in 93-2712. 2. The reply brief, if any, is due 11/26/93 for Atchison, Topeka in 93-1505, for Burlington Northern in 93-1505, for Consolidated Rail in 93-1505, for CSX Transportation in 93-1505, for IL Central Railroad in 93-1505, for Norfolk Southern in 93-1505, for Norfolk & Western in 93-1505, for Southern Pacific in 93-1505, for Union Pacific in 93-1505, for Union Pacific in 93-2378, for Southern Pacific in 93-2378, for Norfolk Southern 93-2378, for Norfolk & Western in 93-2378, for Atchison, Topeka in 93-2378, for Burlington Northern in 93-2378, for Consolidated Rail in 93-2378, for CSX Transportation in 93-2378, for IL Central Railroad in 93-2378, for Southern Pacific in 93-2712, for Norfolk Southern in 93-2712, for Norfolk & Western in 93-2712, for IL Central Railroad in 93-2712, for CSX Transportation in 93-2712, for Consolidated Rail in 93-2712, for Burlington Northern in 93-2712, for Atchison, Topeka in 93-2712. (elea) [93-1505 93-2378 93-2712]
10/12/93	Filed 15c agency #1 brief by Petitioner Union Pacific, et al., in 93-1505, 93-2378 and 93-2712, per order. [93-1505, 93-2378, 93-2712] [536413-1] (carl) [93-1505 93-2378 93-2712]
10/12/93	Filed 10c appendix by Petitioner Union Pacific, et al., in 93-1505, 93-2378 and 93-2712, per order. [93-1505, 93-2378, 93-2712] [536420-1] (carl) [93-1505 93-2378 93-2712]
10/15/93	Filed oversize exhibit in Section 40 of exhibit room. Number of boxes: 1 (briefs; appendix) [93-1505, 93-2378, 93-2712] [510209-1] (cove) [93-1505 93-2378 93-2712]

DATE	PROCEEDINGS
10/18/93	Filed motion by Respondent United Transportatio in 93-1505, Respondent Brohd Locomotive in 93-1505, Respondent United Trans Union in 93-2378, Respondent Brohd Locomotive in 93-2378 for summary affirmance. [537863-1] [93-1505, 93-2378] (roxa) [93-1505 93-2378]
10/22/93	Filed Petitioner Union Pacific in 93-1505, Petitioner Southern Pacific, et al. in 93-1505, 93-2378 and 93-2712. response to Respondent United Transportatio in 93-1505, Respondent Locomotive in 93-1505, Respondent United Trans Union in 93-2378, Respondent Brohd Locomotive in 93-2378 motion for summary affirmance. [539615-1] [93-1505, 93-2378, 93-2712] [539615-1] (carl) [93-1505 93-2378 93-2712]
11/3/93	Filed motion by Respondent Federal Railroad in 93-1505, Respondent S. Mark Lindsey in 93-1505, Respondent TRAN in 93-1505, Respondent Federico Pena in 93-1505, Respondent TRAN in 93-2378, Respondent Federico Pena in 93-2712, Respondent TRAN in 93-2712, Respondent Grady C. Cothen in 93-2712, Respondent Federal Railroad in 93-2712 to extend time to file second brief in agency appeal. [542750-1] [93-1505, 93-2378, 93-2712] (jess) [93-1505 93-2378 93-2712]
11/5/93	ORDER issued GRANTING motion for extension of time to file second brief in agency appeal. [542750-1] in 93-1505, 93-2378, 93-2712 [93-1505, 93-2378, 93-2712] 1. The second brief is due 12/3/93 for Federico Pena in 93-1505, for TRAN in 93-1505, for S. Mark Lindsey in 93-1505, for Federal Railroad in 93-1505, for Brohd Locomotive in 93-1505, for United Transportatio in 93-1505, for TRAN in 93-2378, for Brohd Locomotive in 93-2378, for United Trans Union in 93-2378, for Federal Railroad in 93-2712, for Grady C. Cothen in 93-2712, for TRAN in 93-2712, for Federico Pena in 93-2712. 2. The consolidated reply brief,

DATE	PROCEEDINGS
	if any, is due 12/17/93 for Atchison, Topeka in 93-1505, for Burlington Northern in 93-1505, for Consolidated Rail in 93-1505, for CSX Transportation in 93-1505, for IL Central Railroad in 93-1505, for Norfolk Southern in 93-1505, for Norfolk & Western in 93-1505, for Southern Pacific in 93-1505, for Union Pacific in 93-1505, for Union Pacific in 93-2378, for Southern Pacific in 93-2378, for Norfolk Southern in 93-2378, for Norfolk & Western in 93-2378, for Atchison, Topeka in 93-2378, for Burlington Northern in 93-2378, for Consolidated Rail in 93-2378, for CSX Transportation in 93-2378, for IL Central Railroad in 93-2378, for Southern Pacific in 93-2712, for Norfolk Southern in 93-2712, for Norfolk & Western in 93-2712, for IL Central Railroad in 93-2712, for CSX Transportation in 93-2712, for Rail in 93-2712, for Burlington Northern in 93-2712, for Atchison, Topeka in 93-2712. (jess) [93-1505 93-2378 93-2712]
11/8/93	ORDER issued DENYING motion for summary affirmance. [537863-1] in 93-1505, 93-2378 [93-1505, 93-2378, 93-2712] (cfre) [93-1505 93-2378 93-2712]
12/3/93	Filed 15c agency #2 brief by Respondent United Transportatio in 93-1505, Respondent Brohd Locomotive in 93-1505, Respondent United Trans Union in 93-2378, Respondent Brohd Locomotive in 93-2378. [93-1505, 93-2378, 93-2712] [552825-1] (patb) [93-1505 93-2378 93-2712]
12/10/93	Filed 15c agency #2 brief by Respondent United Transportatio et. al., in 93-1505, in 93-2712, in 93-2712. [93-1505, 93-2378, 93-2712] [555339-1] (patb) [93-1505 93-2378 93-2712]
12/14/93	Filed motion by Petitioner Atchison, Topeka, et. al., in 93-1505, in 93-2378, in 93-2712, to extend time to file reply brief. [555967-1] [93-1505, 93-2378, 93-2712] (patb) [93-1505 93-2378, 93-2712]

DATE	PROCEEDINGS
12/15/93	ORDER issued GRANTING motion for extension of time to file third brief in agency appeal [555967-1] in 93-1505, 93-2378, 93-2712. ak [93-1505, 93-2378, 93-2712] The reply brief, if any, is due 12/23/93 for Atchison, Topeka in 93-1505, in 93-2378, in 93-2712. (patb) [93-1505 93-2378 93-2712]
12/27/93	Filed 15c reply brief by Petitioner Atchison, Topeka, et. al., in 93-1505, in 93-2378, in 93-2712. [93-1505, 93-2378, 93-2712] [560614-1] (patb) [93-1505 93-2378 93-2712]
1/21/94	ORDER: Argument set for Tuesday, February 22, 1994 at 9:30 a.m. 20 minutes to Santa Fe and 20 minutes to Federal Railroad Admin. and union. [93-1505, 93-2378, 93-2712] [566785-1] (broo) [93-1505 93-2378 93-2712]
2/22/94	Case heard and taken under advisement by panel: Circuit Judge William J. Bauer, Circuit Judge Daniel A. Manion, Chief Judge J. P. Gilbert. [93-1505, 93-2378, 93-2712] [576856-1] (broo) [93-1505 93-2378 93-2712]
2/22/94	Case argued by Ronald M. Johnson for Petitioner Atchison, Topeka, Petitioner Burlington Northern, Petitioner Consolidated Rail, Petitioner CSX Transportation, Petitioner IL Central Railroad, Petitioner Norfolk Southern, Petitioner Norfolk & Western, Petitioner Southern Pacific, Petitioner Union Pacific in 93-1505, John F. Daly for Respondent Federico Pena, Respondent TRAN, Respondent S. Mark Lindsey, Respondent Federal Railroad in 93-1505, Ronald M. Johnson for Petitioner Union Pacific, Petitioner Southern Pacific, Petitioner Norfolk Southern, Petitioner Norfolk & Western, Petitioner Atchison, Topeka, Petitioner Burlington Northern, Petitioner Consolidated Rail, Petitioner CSX Transportation, Petitioner IL Central Railroad in 93-2378, John F.

DATE	PROCEEDINGS
	Daly for Respondent TRAN in 93-2378, John F. Daly for Respondent Federal Railroad, Respondent Grady C. Cothen, Respondent TRAN, Respondent Federico Pena in 93-2712, Ronald M. Johnson for Petitioner Southern Pacific, Petitioner Norfolk Southern, Petitioner Norfolk & Western, Petitioner IL Central Railroad, Petitioner CSX Transportation, Petitioner Consolidated Rail, Petitioner Burlington Northern, Petitioner Atchison, Topeka in 93-2712. [93-1505, 93-2378, 93-2712] [463891-1] (broo) [93-1505 93-2378 93-2712]
2/24/94	Agency record on appeal filed. Contents of record: 1 envelope administrative record. [93-1505, 93-2378, 93-2712] [577965-1] (chuc) [93-1505 93-2378 93-2712]
3/8/94	Supplemental record on appeal filed. Contents of record: 1 envelope Administrative record. [93-1505, 93-2378, 93-2712] [20188-1] (chuc) [93-1505 93-2378 93-2712]
7/13/94	Filed opinion of the court by Judge Gilbert. AFFIRMED. Bauer, dissenting, Manion, Gilbert, [93-1505, 93-2378, 93-2712] [510209-1] (patb) [93-1505 93-2378 93-2712]
7/13/94	ORDER: Final judgment filed per opinion. With costs: y. [93-1505, 93-2378, 93-2712] [622115-1] (patb) [93-1505 93-2378 93-2712]
7/21/94	Filed Respondent Federal Railroad in 93-1505, Respondent S. Mark Lindsey in 93-1505, Respondent TRAN in 93-1505, Respondent Federico Pena in 93-1505, Respondent TRAN in 93-2378, Respondent Federico Pena in 93-2712, Respondent TRAN in 93-2712, Respondent Grady C. Cothen in 93-2712, Respondent Federal Railroad in 93-2712 Bill of Costs in the amount of $73.15. [93-1505, 93-2378, 93-2712] [510209-1] (eric) [93-1505 93-2378 93-2712]

DATE	PROCEEDINGS
7/27/94	Filed instanter motion by Petitioner Union Pacific in 93-1505, Petitioner Southern Pacific in 93-1505, Petitioner Norfolk & Western in 93-1505, Petitioner Norfolk Southern in 93-1505, Petitioner IL Central Railroad in 93-1505, Petitioner CSX Transportation in 93-1505, Petitioner Consolidated Rail in 93-1505, Petitioner Burlington Northern in 93-1505, Petitioner Atchison, Topeka in 93-1505, Petitioner IL Central Railroad in 93-2378, Petitioner CSX Transportation in 93-2378, Petitioner Consolidated Rail in 93-2378, Petitioner Burlington Northern in 93-2378, Petitioner Atchison, Topeka in 93-2378, Petitioner Norfolk & Western in 93-2378, Petitioner Norfolk Southern in 93-2378, Petitioner Southern Pacific in 93-2378, Petitioner Union Pacific in 93-2378, Petitioner Atchison, Topeka in 93-2712, Petitioner Burlington Northern in 93-2712, Petitioner Consolidated Rail in 93-2712, Petitioner CSX Transportation in 93-2712, Petitioner IL Central Railroad in 93-2712, Petitioner Norfolk & Western in 93-2712, Petitioner Norfolk Southern in 93-2712, Petitioner Southern Pacific in 93-2712 to file Petition for Rehearing Enbanc. [626371-1] 25c petitioners' Enbanc Petition for Rehearing tendered. [626371-1] [93-1505, 93-2378, 93-2712] (patb) [93-1505 93-2378 93-2712]
7/27/94	Filed 25c Petition for Rehearing with Suggestion for Rehearing Enbanc by Petitioner Union Pacific in 93-1505, Petitioner Southern Pacific in 93-1505, Petitioner Norfolk & Western in 93-1505, Petitioner Norfolk Southern in 93-1505, Petitioner IL Central Railroad in 93-1505, Petitioner CSX Transportation in 93-1505, Petitioner Consolidated Rail in 93-1505, Petitioner Burlington Northern in 93-1505, Petitioner Atchison, Topeka in 93-1505, Petitioner IL Central Railroad in 93-2378, Petitioner CSX Transportation in 93-2378,

DATE	PROCEEDINGS
	Petitioner Consolidated Rail in 93-2378, Petitioner Burlington Northern in 93-2378, Petitioner Atchison, Topeka in 93-2378, Petitioner Norfolk & Western in 93-2378, Petitioner Norfolk Southern in 93-2378, Petitioner Southern Pacific in 93-2378, Petitioner Union Pacific in 93-2378, Petitioner Atchison, Topeka in 93-2712, Petitioner Burlington Northern in 93-2712, Petitioner Consolidated Rail in 93-2712, Petitioner CSX Transportation in 93-2712, Petitioner IL Central Railroad in 93-2712, Petitioner Norfolk & Western in 93-2712, Petitioner Norfolk Southern in 93-2712, Petitioner Southern Pacific in 93-2712, per order. Dist. [93-1505, 93-2378, 93-2712] [626608-1] (carl) [93-1505 93-2378 93-2712]
7/28/94	Sent clerk's copy of letter to Respondent United Transportatio in 93-1505, Respondent Brohd Locomotive in 93-1505, Respondent Federal Railroad in 93-1505, Respondent S. Mark Lindsey in 93-1505, Respondent TRAN in 93-1505, Respondent Federico Pena in 93-1505, Respondent TRAN in 93-2378, Respondent Federico Pena in 93-2712, Respondent TRAN in 93-2712, Respondent Grady C. Cothen in 93-2712, Respondent Federal Railroad in 93-2712 requesting 25c of their Answer to the Petition for Rehearing with Suggestion for Rehearing Enbanc filed by the petitioners' on 7/27/94. [93-1505, 93-2378, 93-2712] [626633-1] Answer to Petition for Enbanc Rehearing due 8/11/94 for Federico Pena in 93-1505, for TRAN in 93-1505, for S. Mark Lindsey in 93-1505, for Federal Railroad in 93-1505, for Brohd Locomotive in 93-1505, for United Transportation in 93-1505, for TRAN in 93-2378, for Federal Railroad in 93-2712, for Grady C. Cothen in 93-2712, for TRAN in 93-2712, for Federico Pena in 93-2712. (carl) [93-1505 93-2378 93-2712]
7/28/94	ORDER issued GRANTING instanter motion to file Petition for Rehearing Enbanc. [626371-1]

DATE	PROCEEDINGS
	in 93-1505, 93-2378, 93-2712 The clerk of this court is directed to file instanter the tendered copies of the Petition for Rehearing with Suggestion for Rehearing En Banc. [626371-1] ak [93-1505, 93-2378, 93-2712] (conw) [93-1505 93-2378 93-2712]
8/11/94	Filed 25c Answer of Respondent Federal Railroad in 93-1505, Respondent S. Mark Lindsey in 93-1505, Respondent TRAN in 93-1505, Respondent Federico Pena in 93-1505, Respondent TRAN in 93-2378, Respondent Federico Pena in 93-2712, Respondent TRAN in 93-2712, Respondent Grady C. Cothen in 93-2712, Respondent Federal Railroad in 93-2712 to Petition for Rehearing with Suggestion for Rehearing Enbanc, per order. Dist. [93-1505, 93-2378, 93-2712] [631311-1] (elea) [93-1505 93-2378 93-2712]
8/11/94	Filed Respondent United Transportatio in 93-1505, Respondent Brohd Locomotive in 93-1505, Respondent United Trans Union in 93-2378, Respondent Brohd Locomotive in 93-2378 opposition to Petitioner Union Pacific et al., Petition for Rehearing En Banc. [93-1505, 93-2378, 93-2712] [510209-1] (carl) [93-1505 93-2378 93-2712]
8/30/94	ORDER: Petitioners Union Pacific, et al. in 93-1505, Petitioners IL Central Railroad, et al. in 93-2378, Petitioners Atchison, Topeka, et al. in 93-2712 Petition for Rehearing with Suggestion for Rehearing Enbanc is GRANTED. IT IS FURTHER ORDERED that the judgment and opinion entered in this case on 7/13/94 be VACATED. This case will be reheard en banc at the convenience of the court. The Honorable Walter J. Cummings did not participate in the consideration or decision of this Petition for Rehearing En Banc. [93-1505, 93-2378, 93-2712] (jonp) [93-1505 93-2378 93-2712]

DATE	PROCEEDINGS
9/26/94	ORDER: Argument set for Tuesday, October 18, 1994 at 10:00 a.m. Each side limited to 15 minutes. [93-1505, 93-2378, 93-2712] [645842-1] (broo) [93-1505 93-2378 93-2712]
10/7/94	Filed Petitioner Union Pacific in 93-1505, Petitioner Southern Pacific in 93-1505, Petitioner Norfolk & Western in 93-1505, Petitioner Norfolk Southern in 93-1505, Petitioner IL Central Railroad in 93-1505, Petitioner CSX Transportation in 93-1505, Petitioner Consolidated Rail in 93-1505, Petitioner Burlington Northern in 93-1505, Petitioner Atchison, Topeka in 93-1505, Petitioner IL Central Railroad in 93-2378, Petitioner CSX Transportation in 93-2378, Petitioner Consolidated Rail in 93-2378, Petitioner Burlington Northern in 93-2378, Petitioner Atchison, Topeka in 93-2378, Petitioner Norfolk & Western in 93-2378, Petitioner Norfolk Southern in 93-2378, Petitioner Southern Pacific in 93-2378, Petitioner Union Pacific in 93-2378, Petitioner Atchison, Topeka in 93-2712, Petitioner Burlington Northern in 93-2712, Petitioner Consolidated Rail in 93-2712, Petitioner Consolidated Rail in 93-2712, Petitioner CSX Transportation in 93-2712, Petitioner IL Central Railroad in 93-2712, Petitioner Norfolk & Western in 93-2712, Petitioner Norfolk Southern in 93-2712, Petitioner Southern Pacific in 93-2712 Citation of Additional Authority, per CR 28(j). Dist. [93-1505, 93-2378, 93-2712] [649692-1] (patb) [93-1505 93-2378 93-2712]
10/18/94	Case heard and taken under advisement by panel: Enbanc [93-1505, 93-2378, 93-2712] [662540-1] (broo) [93-1505 93-2378 93-2712]
10/18/94	Case argued by Ronald M. Johnson for Petitioner Atchison, Topeka, Petitioner Burlington Northern, Petitioner Consolidated Rail, Petitioner CSX Transportation, Petitioner IL Central Railroad, Petitioner Norfolk Southern, Petitioner Norfolk &

DATE	PROCEEDINGS
	Western, Petitioner Southern Pacific, Petitioner Union Pacific in 93-1505, John F. Daly for Respondent Federico Pena, Respondent TRAN, Respondent S. Mark Lindsey, Respondent Federal Railroad in 93-1505, Ronald M. Johnson for Petitioner Union Pacific, Petitioner Southern Pacific, Petitioner Norfolk Southern, Petitioner Norfolk & Western, Petitioner Atchison, Topeka, Petitioner Burlington Northern, Petitioner Consolidated Rail, Petitioner CSX Transportation, Petitioner IL Central Railroad in 93-2378, John F. Daly for Respondent TRAN in 93-2378, Lawrence M. Mann for Respondent TRAN, Respondent Brohd Locomotive, Respondent United Trans Union in 93-2378 Lawrence M. Mann for Respondent Federal Railroad, Respondent Grady C. Cothen, Respondent TRAN, Respondent Federico Pena in 93-2712, John F. Daly for Respondent Federal Railroad, Respondent Grady C. Cothen, Respondent TRAN, Respondent Federico Pena in 93-2712, Ronald M. Johnson for Petitioner Southern Pacific, Petitioner Norfolk Southern, Petitioner Norfolk & Western, Petitioner IL Central Railroad, Petitioner CSX Transportation, Petitioner Consolidated Rail, Petitioner Burlington Northern, Petitioner Atchison, Topeka in 93-2712 . [93-1505, 93-2378, 93-2712] [510209-1] (broo) [93-1505 93-2378 93-2712]
12/6/94	Filed oversized record in Section # 40 of exhibit room: 1 box containing assorted briefs. [510209-1] [93-1505, 93-2378, 93-2712] (cove) [93-1505 93-2378 93-2712]
12/29/94	Filed opinion of the court by Judge Bauer. The petitions for review of the railroads are GRANTED and the orders of the Federal Railroad Administration are VACATED. Enbanc, Posner, concurring, Easterbrook, concurring, Manion, concurring. (The Hon. Walter J. Cummings did not participate in the argument or decision in this

DATE	PROCEEDINGS
	case.) [93-1505, 93-2378, 93-2712] [510209-1] (patb) [93-1505 93-2378 93-2712]
12/29/94	ORDER: Final judgment filed per opinion. With costs: y. [93-1505, 93-2378, 93-2712] [678052-1] (patb) [93-1505 93-2378 93-2712]
1/18/95	Filed motion by Respondent FRA in 93-1505, Respondent TRAN in 93-1505, Respondent TRAN in 93-2378, Respondent TRAN in 93-2712, Respondent FRA in 93-2712 to stay the mandate. [684347-1] [93-1505, 93-2378, 93-2712] (elea) [93-1505 93-2378 93-2712]
1/19/95	Filed Petitioner Union Pacific in 93-1505, Petitioner Southern Pacific in 93-1505, Petitioner Norfolk & Western in 93-1505, Petitioner Norfolk Southern in 93-1505, Petitioner IL Central Railroad in 93-1505, Petitioner CSX Transportation in 93-1505, Petitioner Consolidated Rail in 93-1505, Petitioner Burlington Northern in 93-1505, Petitioner Atchison, Topeka in 93-1505, Petitioner IL Central Railroad in 93-2378, Petitioner CSX Transportation in 93-2378, Petitioner Consolidated Rail in 93-2378, Petitioner Burlington Northern in 93-2378, Petitioner Atchison, Topeka in 93-2378, Petitioner Norfolk & Western in 93-2378, Petitioner Norfolk Southern in 93-2378, Petitioner Southern Pacific in 93-2378, Petitioner Union Pacific in 93-2378, Petitioner Atchison, Topeka in 93-2712, Petitioner Burlington Northern in 93-2712, Petitioner Consolidated Rail in 93-2712, Petitioner CSX Transportation in 93-2712, Petitioner IL Central Railroad in 93-2712, Petitioner Norfolk & Western in 93-2712. Petitioner Norfolk Southern in 93-2712. Petitioner Southern Pacific in 93-2712 response to Respondent FRA in 93-1505, Respondent TRAN in 93-1505, Respondent TRAN in 93-2378, Respondent TRAN in 93-2712, Respondent FRA in 93-2712 motion to stay the man-

DATE	PROCEEDINGS
	date. [684805-1] [93-1505, 93-2378, 93-2712] [684805-1] (elea) [93-1505 93-2378 93-2712]
1/20/95	ORDER issued GRANTING motions to stay the mandate. The mandate is STAYED to and including 2/19/95. [684347-1] [684805-1] in 93-1505, 93-2378, 93-2712 AM [93-1505, 93-2378, 93-2712] (carl) [93-1505 93-2378 93-2712]
2/27/95	AGENCY CLOSING LETTER ISSUED WITH BILL OF COSTS IN THE AMOUNT OF $73.15. RECORD TO BE RETURNED LATER. (Contents to be returned: 2 envelopes administrative record.) [93-1505, 93-2378, 93-2712] [684805-1] (jonp) [93-1505 93-2378 93-2712]
3/3/95	The court, on its own motion, VACATES the Bill of Costs issued on 2/27/95 in the amount of $73.15. [497798-1] AK [93-1505, 93-2378, 93-2712] (jonp) [93-1505 93-2378 93-2712]
3/6/95	Filed instanter motion by Petitioner Atchison, Topeka, et al., in 93-1505, Petitioner Atchison, Topeka, et al., in 93-2378, Petitioner Atchison, Topeka, et al., in 93-2712 to file bill of costs. (WITHDRAWN per 3/10/95 order.) [700477-1] [93-1505, 93-2378, 93-2712] [700477-1] (patb) [93-1505 93-2378 93-2712]
3/7/95	Filed motion by Petitioner Atchison, Topeka, et al., in 93-1505, Petitioner Atchison, Topeka, et al., in 93-2378, Petitioner Atchison, Topeka, et al., in 93-2712 to withdraw motion for bill of costs instanter. [701670-1] [93-1505, 93-2378, 93-2712] (patb) [93-1505 93-2378 93-2712]
3/10/95	ORDER issued GRANTING motion to withdraw and "PETITIONERS' MOTION TO FILE BILL OF COSTS INSTANTER", filed on 3/6/95, is WITHDRAWN. [701670-1] [700477-1] AK [93-1505, 93-2378, 93-2712] (patb) [93-1505 93-2378 93-2712]

DATE	PROCEEDINGS
4/3/95	Filed notice from the Supreme Court of the filing of a Petition for Writ of Certiorari. Supreme Court Case No.: 94-1592. [93-1505, 93-2378, 93-2712] [709776-1] (jame) [93-1505 93-2378 93-2712]
6/22/95	Filed order from the Supreme Court GRANTING the Petition for Writ of Certiorari. Supreme Court Case No.: 94-1592. [93-1505, 93-2378, 93-2712] [737067-1] (carl) [93-1505 93-2378 93-2712]
	Case No. 93-2378
6/7/93	Petition for Review docketed. Filed Original and 3 copies of petitioner's Petition for Review. [93-2378] [497798-1] Appearance form due on 7/7/93 for Lawrence M. Mann, for John F. Daly, for S. Mark Lindsey, for Rosalind A. Knapp, for Janet Reno, for Brenda J. Council, for Mark V. Holden, for Ronald M. Johnson, for Robert S. Bogason, for William P. Stallsmith, for Ronald A. Lane, for James D. Tomola, for John B. Rossi, for Lawrence M. Stroik, for Guy Vitello. Agency record or cert. list due on 7/19/93 for Department Transport. (cint) [93-2378]
6/7/93	Filed clerk's copy of notice of service on counsel for respondent. [93-2378] [497798-1] (cint) [93-2378]
6/16/93	Filed motion by Brotherhood of Locomotive Engineers and United Transportation Union to intervene. [502798-1] [93-2378] (chry) [93-2378]
6/17/93	Filed motion by Petitioner Atchison, Topeka, Petitioner Burlington Northern, Petitioner Consolidated Rail, Petitioner CSX Transportation, Petitioner IL Central Railroad, Petitioner Norfolk Southern, Petitioner Norfolk & Western, Petitioner Southern Pacific, Petitioner Union Pacific to abate case. [500593-1] [93-2378] (roxa) [93-2378]

DATE	PROCEEDINGS
6/17/93	Appearance form filed for Respondent Department Transport by attorney Billie Ann Stultz, Daniel C. Smith, David Herbert Kasminoff. [93-2378] [497798-1] (cfre) [93-2378]
6/17/93	Appearance form filed for Petitioner Atchison, Topeka, et al., by attorney Mark V. Holden, Ronald M. Johnson. [93-2378] [497798-1] (patb) [93-2378]
6/18/93	Added attorney Malcolm L. Stewart for Respondent Department Transport, per appearance form. (roxa) [93-2378]
6/18/93	Appearance form filed for Respondent Department Transport by attorney Malcolm L. Stewart, John F. Daly. [93-2378] [497798-1] (roxa) [93-2378]
6/24/93	Added attorney Steven M. Weisbaum for Respondent Department Transport, per appearance form. (roxa) [93-2378]
6/24/93	Appearance form filed for Respondent Department Transport by attorney Steven M. Weisbaum, Lawrence M. Mann. [93-2378] [497798-1] (roxa) [93-2378]
6/24/93	ORDER: GRANTING motion to abate case [500593-1] in 93-2378 The court orders these appeals CONSOLIDATED for purposes of briefing and disposition and further proceedings in this matter are HELD IN ABEYANCE. Petitioners shall file, on or before 7/16/93, a status report advising this court whether the agency has issued a decision on petitioners' Petition for Interpretation, and, if so, its impact on this appeal. [93-1505, 93-2378] [500593-1] (carl) [93-1505 93-2378]
6/24/93	[93-1505, 93-2378] [463891-1] Status report due on or before 7/16/93 for Union Pacific in 93-1505, for Southern Pacific in 93-1505, for Norfolk & Western in 93-1505, for Norfolk Southern in

DATE	PROCEEDINGS
	93-1505, for IL Central Railroad in 93-1505, for CSX Transportation in 93-1505, for Consolidated Rail in 93-1505, for Burlington Northern in 93-1505, for Atchison, Topeka in 93-1505, for Union Pacific in 93-2378, for Southern Pacific in 93-2378, for Norfolk & Western in 93-2378, for Norfolk Southern in 93-2378, for IL Central Railroad in 93-2378, for CSX Transportation in 93-2378, for Consolidated Rail in 93-2378, for Burlington Northern in 93-2378, for Atchison, Topeka in 93-2378, per 6/24/93 order. (carl) [93-1505 93-2378]
6/25/93	ORDER issued GRANTING motion to intervene and the Brotherhood of Locomotive Engineers and the United States Union may participate in this appeal as intervening respondents. [502798-1] [93-2387] (carl) [93-2378]
7/16/93	Filed status report by Petitioner Union Pacific in 93-1505, Petitioner Southern Pacific in 93-1505, Petitioner Norfolk & Western in 93-1505, Petitioner Norfolk Southern in 93-1505, Petitioner IL Central Railroad in 93-1505, Petitioner CSX Transpotration in 93-1505, Petitioner Consolidated Rail in 93-1505. [93-1505] [509874-1] (odea) [93-1505]
7/21/93	ORDER: The court orders these appeals [93-1505, 93-2378, 93-2712] CONSOLIDATED for purposes of briefing and disposition. Record preparation and briefing on the merits shall proceed in accordance with Fed. R. App. P. 17 and 31. [510209-1] (patb) [93-1505 93-2378 93-2712]
8/25/93	Certified List filed by Respondent Federal Railroad in 93-1505, Respondent TRAN in 93-2378, Respondent Federal Railroad in 93-2712. [93-1505, 93-2378, 93-2712] [521232-1] The first brief in this appeal is due 10/4/93 for Atchison, Topeka in 93-1505, for Burlington Northern in 93-1505, for Consolidated Rail in 93-1505, for CSX Trans-

DATE	PROCEEDINGS
	portation in 93-1505, for IL Central Railroad in 93-1505, for Norfolk Southern in 93-1505, for Norfolk & Western in 93-1505, for Southern Pacific in 93-1505, for Union Pacific in 93-1505, for Union Pacific in 93-2378, for Southern Pacific in 93-2378, for Norfolk Southern in 93-2378, for Norfolk & Western in 93-2378, for Atchison, Topeka in 93-2378, for Burlington Northern in 93-2378, for Consolidated Rail in 93-2378, for CSX Transportation in 93-2378, for IL Central Railroad in 93-2378, for Southern Pacific in 93-2712, for Norfolk Southern in 93-2712, for Norfolk & Western in 93-2712, for IL Central Railroad in 93-2712, for CSX Transportation in 93-2712, for Consolidated Rail in 93-2712, for Burlington Northern in 93-2712, for Atchison, Topeka in 93-2712. (eric) [93-1505 93-2378 93-2712]
10/5/93	Brief deficiency letter sent to Petitioner Union Pacific in 93-1505, Petitioner Southern Pacific in 93-1505, Petitioner Norfolk & Western in 93-1505, Petitioner Norfolk Southern in 93-1505, Petitioner IL Central Railroad in 93-1505, Petitioner CSX Transportation in 93-1505, Petitioner Consolidated Rail in 93-1505, Petitioner Burlington Northern in 93-1505, Petitioner Atchison, Topeka in 93-1505, Petitioner IL Central Railroad in 93-2378, Petitioner CSX Transportation in 93-2378, Petitioner Consolidated Rail in 93-2378, Petitioner Burlington Northern in 93-2378, Petitioner Atchison, Topeka in 93-2378, Petitioner Norfolk & Western in 93-2378, Petitioner Norfolk Southern in 93-2378, Petitioner Southern Pacific in 93-2378, Petitioner Union Pacific in 93-2378, Petitioner Atchison, Topeka in 93-2712, Petitioner Burlington Northern in 93-2712, Petitioner Consolidated Rail in 93-2712, Petitioner CSX Transportation in 93-2712, Petitioner IL Central Railroad in 93-2712, Petitioner Norfolk & Western in 93-2712, Petitioner Norfolk Southern in 93-2712, Petitioner

DATE	PROCEEDINGS
	Southern Pacific in 93-2712. [510209-1] [93-1505, 93-2378, 93-2712] (duda) [93-1505 93-2378 93-2712]
10/12/93	Filed instanter motion by Petitioner Union Pacific in 93-1505, Petitioner Southern Pacific in 93-1505, Petitioner Norfolk & Western in 93-1505, Petitioner Norfolk Southern in 93-1505, Petitioner IL Central Railroad in 93-1505, Petitioner CSX Transportation in 93-1505, Petitioner Consolidated Rail in 93-1505, Petitioner Burlington Northern in 93-1505, Petitioner Atchison, Topeka in 93-1505, Petitioner IL Central Railroad in 93-2378, Petitioner CSX Transportation in 93-2378, Petitioner Consolidated Rail in 93-2378, Petitioner Burlington Northern in 93-2378, Petitioner Atchison, Topeka in 93-2378, Petitioner Norfolk & Western in 93-2378, Petitioner Norfolk Southern in 93-2378, Petitioner Southern Pacific in 93-2378, Petitioner Union Pacific in 93-2378, Petitioner Atchison, Topeka in 93-2712, Petitioner Burlington Northern in 93-2712, Petitioner Consolidated Rail in 93-2712, Petitioner CSX Transportation in 93-2712, Petitioner IL Central Railroad in 93-2712, Petitioner Norfolk & Western in 93-2712, Petitioner Norfolk Southern in 93-2712, Petitioner Southern Pacific in 93-2712 to file first brief in agency appeal. [536122-1]. 15c petitioner's brief 10c appendix tendered. [536122-1] [93-1505, 93-2378, 93-2712] (roxa) [93-1505 93-2378 93-2712]
10/12/93	ORDER issued GRANTING instanter motion to file first brief in agency appeal. [536122-1] in 93-1505, 93-2378, 93-2712 The clerk of this court is directed to file instanter the tendered copies of the petitioners' consolidated brief. [93-1505, 93-2378, 93-2712] [536122-1]. 1. The second agency brief is due 11/12/93 for Federico Pena in 93-1505, for TRAN in 93-1505, for S. Mark Lindsey in 93-1505, for Federal Railroad in 93-1505,

DATE	PROCEEDINGS
	for Brohd Locomotive in 93-1505, for United Transportatio in 93-1505, for TRAN in 93-2378, for Brohd Locomotive in 93-2378, for United Trans Union in 93-2378, for Federal Railroad in 93-2712, for Grady C. Cothen in 93-2712, for TRAN in 93-2712, for Federico Pena in 93-2712. 2. The reply brief, if any, is due 11/26/93 for Atchison, Topeka in 93-1505, for Burlington Northern in 93-1505, for Consolidated Rail in 93-1505, for CSX Transportation in 93-1505, for IL Central Railroad in 93-1505, for Norfolk Southern in 93-1505, for Norfolk & Western in 93-1505, for Southern Pacific in 93-1505, for Union Pacific in 93-1505, for Union Pacific in 93-2378, for Southern Pacific in 93-2378, for Norfolk Southern in 93-2378, for Norfolk & Western in 93-2378, for Atchison, Topeka in 93-2378, for Burlington Northern in 93-2378, for Consolidated Rail in 93-2378, for CSX Transportation in 93-2378, for IL Central Railroad in 93-2378, for Southern Pacific in 93-2712, for Norfolk Southern in 93-2712, for Norfolk & Western in 93-2712, for IL Central Railroad in 93-2712, for CSX Transportation in 93-2712, for Consolidated Rail in 93-2712, for Burlington Northern in 93-2712, for Atchison, Topeka in 93-2712. (elea) [93-1505 93-2378 93-2712]
10/12/93	Filed 15c agency #1 brief by Petitioner Union Pacific, et al., in 93-1505, 93-2378 and 93-2712, per order. [93-1505, 93-2378, 93-2712] [536413-1] (carl) [93-1505 93-2378 93-2712]
10/12/93	Filed 10c appendix by Petitioner Union Pacific, et al., in 93-1505, 93-2378 and 93-2712, per order. [93-1505, 93-2378, 93-2712] [536420-1] (carl) [93-1505 93-2378 93-2712]
10/15/93	Filed oversize exhibit in Section 40 of exhibit room. Number of boxes: 1 (briefs; appendix)

DATE	PROCEEDINGS
	[93-1505, 93-2378, 93-2712] [510209-1] (cove) [93-1505 93-2378 93-2712]
10/18/93	Filed motion by Respondent United Transportatio in 93-1505, Respondent Brohd Locomotive in 93-1505, Respondent United Trans Union in 93-2378, Respondent Brohd Locomotive in 93-2378 for summary affirmance. [537863-1] [93-1505, 93-2378] (roxa) [93-1505 93-2378]
10/22/93	Filed Petitioner Union Pacific in 93-1505, Petitioner Southern Pacific, et al. in 93-1505, 93-2378 and 93-2712. response to Respondent United Transportatio in 93-1505, Respondent Locomotive in 93-1505, Respondent United Trans Union in 93-2378, Respondent Brohd Locomotive in 93-2378 motion for summary affirmance. [539615-1] [93-1505, 93-2378, 93-2712] [539615-1] (carl) [93-1505 93-2378 93-2712]
11/3/93	Filed motion by Respondent Federal Railroad in 93-1505, Respondent S. Mark Lindsey in 93-1505, Respondent TRAN in 93-1505, Respondent Federico Pena in 93-1505, Respondent TRAN in 93-2378, Respondent Federico Pena in 93-2712, Respondent TRAN in 93-2712, Respondent Grady C. Cothen in 93-2712, Respondent Federal Railroad in 93-2712 to extend time to file second brief in agency appeal. [542750-1] [93-1505, 93-2378, 93-2712] (jess) [93-1505 93-2378 93-2712]
11/5/93	ORDER issued GRANTING motion for extension of time to file second brief in agency appeal. [542750-1] in 93-1505, 93-2378, 93-2712 [93-1505, 93-2378, 93-2712] 1. The second brief is due 12/3/93 for Federico Pena in 93-1505, for TRAN in 93-1505, for S. Mark Lindsey in 93-1505, for Federal Railroad in 93-1505, for Brohd Locomotive in 93-1505, for United Transportatio in 93-1505, for TRAN in 93-2378, for Brohd Locomotive in 93-2378, for United Trans Union in 93-

DATE	PROCEEDINGS
	2378, for Federal Railroad in 93-2712, for Grady C. Cothen in 93-2712, for TRAN in 93-2712, for Federico Pena in 93-2712. 2. The consolidated reply brief, if any, is due 12/17/93 for Atchison, Topeka in 93-1505, for Burlington Northern in 93-1505, for Consolidated Rail in 93-1505, for CSX Transportation in 93-1505, for IL Central Railroad in 93-1505, for Norfolk Southern in 93-1505, for Norfolk & Western in 93-1505, for Southern Pacific in 93-1505, for Union Pacific in 93-1505, for Union Pacific in 93-2378, for Southern Pacific in 93-2378, for Norfolk Southern in 93-2378, for Norfolk & Western in 93-2378, for Atchison, Topeka in 93-2378, for Burlington Northern in 93-2378, for Consolidated Rail in 93-2378, for CSX Transportation in 93-2378, for IL Central Railroad in 93-2378, for Southern Pacific in 93-2712, for Norfolk Southern in 93-2712, for Norfolk & Western in 93-2712, for IL Central Railroad in 93-2712, for CSX Transportation in 93-2712, for Rail in 93-2712, for Burlington Northern in 93-2712, for Atchison, Topeka in 93-2712. (jess) [93-1505 93-2378 93-2712]
11/8/93	ORDER issued DENYING motion for summary affirmance. [537863-1] in 93-1505, 93-2378 [93-1505, 93-2378, 93-2712] (cfre) [93-1505 93-2378 93-2712]
12/3/93	Filed 15c agency #2 brief by Respondent United Transportatio in 93-1505, Respondent Brohd Locomotive in 93-1505, Respondent United Trans Union in 93-2378, Respondent Brohd Locomotive in 93-2378. [93-1505, 93-2378, 93-2712] [552825-1] (patb) [93-1505 93-2378 93-2712]
12/10/93	Filed 15c agency #2 brief by Respondent United Transportatio et al., in 93-1505, in 93-2712, in 93-2712. [93-1505, 93-2378, 93-2712] [555339-1] (patb) [93-1505 93-2378 93-2712]

DATE	PROCEEDINGS
12/14/93	Filed motion by Petitioner Atchison, Topeka, et al., in 93-1505, in 93-2378, in 93-2712, to extend time to file reply brief. [555967-1] [93-1505, 93-2378, 93-2712] (patb) [93-1505 93-2378 93-2712]
12/15/93	ORDER issued GRANTING motion for extension of time to file third brief in agency appeal [555967-1] in 93-1505, 93-2378, 93-2712. ak [93-1505, 93-2378, 93-2712] The reply brief if any, is due 12/23/93 for Atchison, Topeka in 93-1505, in 93-2378, in 93,2712. (patb) [93-1505 93-2378 93-2712]
12/27/93	Filed 15c reply brief by Petitioner Atchison, Topeka, et. al., in 93-1505, in 93-2378, in 93-2712. [93-1505, 93-2378, 93-2712] [560614-1] (patb) [93-1505 93-2378 93-2712]
1/21/94	ORDER: Argument set for Tuesday, February 22, 1994 at 9:30 a.m. 20 minutes to Santa Fe and 20 minutes to Federal Railroad Admin. and union. [93-1505, 93-2378, 93-2712] [566785-1] (broo) [93-1505 93-2378 93-2712]
2/22/94	Case heard and taken under advisement by panel: Circuit Judge William J. Bauer, Circuit Judge Daniel A. Manion, Chief Judge J.P. Gilbert. [93-1505, 93-2378, 93-2712] [576856-1] (broo) [93-1505 93-2378 93-2712]
2/22/94	Case argued by Ronald M. Johnson for Petitioner Atchison, Topeka, Petitioner Burlington Northern, Petitioner Consolidated Rail, Petitioner CSX Transportation, Petitioner IL Central Railroad, Petitioner Norfolk Southern, Petitioner Norfolk & Western, Petitioner Southern Pacific, Petitioner Union Pacific in 93-1505, John F. Daly for Respondent Federico Pena, Respondent TRAN, Respondent S. Mark Lindsey, Respondent Federal Railroad in 93-1505, Ronald M. Johnson for Petitioner Union Pacific, Petitioner Southern Pacific,

DATE	PROCEEDINGS
	Petitioner Norfolk Southern, Petitioner Norfolk & Western, Petitioner Atchison, Topeka, Petitioner Burlington Northern, Petitioner Consolidated Rail, Petitioner CSX Transportation, Petitioner IL Central Railroad in 93-2378, John F. Daly for Respondent TRAN in 93-2378, John F. Daly for Respondent Federal Railroad, Respondent Grady C. Cothen, Respondent TRAN, Respondent Federico Pena in 93-2712, Ronald M. Johnson for Petitioner Southern Pacific, Petitioner Norfolk Southern, Petitioner Norfolk & Western, Petitioner IL Central Railroad, Petitioner CSX Transportation, Petitioner Consolidated Rail, Petitioner Burlington Northern, Petitioner Atchison, Topeka in 93-2712. [93-1505, 93-2378, 93-2712] [463891-1] (broo) [93-1505 93-2378 93-2712]
2/24/94	Agency record on appeal filed. Contents of record: 1 envelope administrative record. [93-1505, 93-2378, 93-2712 [577965-1] (chuc) [93-1505 93-2378 93-2712]
3/8/94	Supplemental record on appeal filed. Contents of record: 1 envelope Administrative record. [93-1505, 93-2378, 93-2712] [20188-1] (chuc) [93-1505 93-2378 93-2712]
7/13/94	Filed opinion of the court by Judge Gilbert. AFFIRMED. Bauer, dissenting, Manion, Gilbert, [93-1505, 93-2378, 93-2712] [510209-1] (patb) [93-1505 93-2378 93-2712]
7/13/94	ORDER: Final judgment filed per opinion. With costs: y. [93-1505, 93-2378, 93-2712] [622115-1] (patb) [93-1505 93-2378 93-2712]
7/21/94	Filed Respondent Federal Railroad in 93-1505, Respondent S. Mark Lindsey in 93-1505, Respondent TRAN in 93-1505, Respondent Federico Pena in 93-1505, Respondent TRAN in 93-2378, Re-

DATE	PROCEEDINGS
	spondent Federico Pena in 93-2712, Respondent TRAN in 93-2712, Respondent Grady C. Cothen in 93-2712, Respondent Federal Railroad in 93-2712 Bill of Costs in the amount of $73.15. [93-1505, 93-2378, 93-2712] [510209-1] (eric) [93-1505 93-2378 93-2712]
7/27/94	Filed instanter motion by Petitioner Union Pacific in 93-1505, Petitioner Southern Pacific in 93-1505, Petitioner Norfolk & Western in 93-1505, Petitioner Norfolk Southern in 93-1505, Petitioner IL Central Railroad in 93-1505, Petitioner CSX Transportation in 93-1505, Petitioner Consolidated Rail in 93-1505, Petitioner Burlington Northern in 93-1505, Petitioner Atchison, Topeka in 93-1505, Petitioner IL Central Railroad in 93-2378, Petitioner CSX Transportation in 93-2378, Petitioner Consolidated Rail in 93-2378, Petitioner Burlington Northern in 93-2378, Petitioner Atchison, Topeka in 93-2378, Petitioner Norfolk & Western in 93-2378, Petitioner Norfolk Southern in 93-2378, Petitioner Southern Pacific in 93-2378, Petitioner Union Pacific in 93-2378, Petitioner Atchison, Topeka in 93-2712, Petitioner Burlington Northern in 93-2712, Petitioner Consolidated Rail in 93-2712, Petitioner CSX Transportation in 93-2712, Petitioner IL Central Railroad in 93-2712, Petitioner Norfolk & Western in 93-2712, Petitioner Norfolk Southern in 93-2712, Petitioner Southern Pacific in 93-2712 to file Petition for Rehearing Enbanc. [626371-1] 25c petitioners' Enbanc Petition for Rehearing tendered. [626371-1] [93-1505, 93-2378, 93-2712] (patb) [93-1505 93-2378 93-2712]
7/27/94	Filed 25c Petition for Rehearing with Suggestion for Rehearing Enbanc by Petitioner Union Pacific in 93-1505, Petitioner Southern Pacific in 93-1505, Petitioner Norfolk & Western in 93-1505, Petitioner Norfolk Southern in 93-1505, Petitioner IL

DATE	PROCEEDINGS
	Central Railroad in 93-1505, Petitioner CSX Transportation in 93-1505, Petitioner Consolidated Rail in 93-1505, Petitioner Burlington Northern in 93-1505, Petitioner Atchison, Topeka in 93-1505, Petitioner IL Central Railroad in 93-2378, Petitioner CSX Transportation in 93-2378, Petitioner Consolidated Rail in 93-2378, Petitioner Burlington Northern in 93-2378, Petitioner Atchison, Topeka in 93-2378, Petitioner Norfolk & Western in 93-2378, Petitioner Norfolk Southern in 93-2378, Petitioner Southern Pacific in 93-2378, Petitioner Union Pacific in 93-2378, Petitioner Atchison, Topeka in 93-2712, Petitioner Burlington Northern in 93-2712, Petitioner Consolidated Rail in 93-2712, Petitioner CSX Transportation in 93-2712, Petitioner IL Central Railroad in 93-2712, Petitioner Norfolk & Western in 93-2712, Petitioner Norfolk Southern in 93-2712, Petitioner Southern Pacific in 93-2712, per order. Dist. [93-1505, 93-2378, 93-2712] [626608-1] (carl) [93-1505 93-2378 93-2712]
7/28/94	Sent clerk's copy of letter to Respondent United Transportation in 93-1505, Respondent Brohd Locomotive in 93-1505, Respondent Federal Railroad in 93-1505, Respondent S. Mark Lindsey in 93-1505, Respondent TRAN in 93-1505, Respondent Federico Pena in 93-1505, Respondent TRAN in 93-2378, Respondent Federico Pena in 93-2712, Respondent TRAN in 93-2712, Respondent Grady C. Cothen in 93-2712, Respondent Federal Railroad in 93-2712 requesting 25c of their Answer to the Petition for Rehearing with Suggestion for Rehearing Enbanc filed by the petitioners' on 7/27/94. [93-1505, 93-2378, 93-2712] [626633-1] Answer to Petition for Enbanc Rehearing due 8/11/94 for Federico Pena in 93-1505, for TRAN in 93-1505, for S. Mark Lindsey in 93-1505, for Federal Railroad in 93-1505, for Brohd Locomotive in 93-1505, for United Transportatio in 93-1505,

DATE	PROCEEDINGS
	for TRAN in 93-2378, for Federal Railroad in 93-2712, for Grady C. Cothen in 93-2712, for TRAN in 93-2712, for Federico Pena in 93-2712. (carl) [93-1505 93-2378 93-2712]
7/28/94	ORDER issued GRANTING instanter motion to file Petition for Rehearing Enbanc. [626371-1] in 93-1505, 93-2378, 93-2712 The clerk of this court is directed to file instanter the tendered copies of the Petition for Rehearing with Suggestion for Rehearing En Banc. [626371-1] ak [93-1505, 93-2378, 93-2712] (conw) [93-1505 93-2378 93-2712]
8/11/94	Filed 25c Answer of Respondent Federal Railroad in 93-1505, Respondent S. Mark Lindsey in 93-1505, Respondent TRAN in 93-1505, Respondent Federico Pena in 93-1505, Respondent TRAN in 93-2378, Respondent Federico Pena in 93-2712, Respondent TRAN in 93-2712, Respondent Grady C. Cothen in 93-2712, Respondent Federal Railroad in 93-2712 to Petition for Rehearing with Suggestion for Rehearing Enbanc, per order. Dist. [93-1505, 93-2378, 93-2712] [631311-1] (elea) [93-1505 93-2378 93-2712]
8/11/94	Filed Respondent United Transportatio in 93-1505, Respondent Brohd Locomotive in 93-1505, Respondent United Trans Union in 93-2378, Respondent Brohd Locomotive in 93-2378 opposition to Petitioner Union Pacific et al., Petition for Rehearing En Banc. [93-1505, 93-2378, 93-2712] [510209-1] (carl) [93-1505 93-2378 93-2712]
8/30/94	ORDER: Petitioners Union Pacific, et al. in 93-1505, Petitioners IL Central Railroad, et al. in 93-2378, Petitioners Atchison, Topeka, et al. in 93-2712 Petition for Rehearing with Suggestion for Rehearing Enbanc is GRANTED. IT IS FURTHER ORDERED that the judgment and opinion

DATE	PROCEEDINGS
	entered in this case on 7/13/94 be VACATED. This case will be reheard en banc at the convenience of the court. The Honorable Walter J. Cummings did not participate in the consideration or decision of this Petition for Rehearing En Banc. [93-1505, 93-2378, 93-2712] (jonp) [93-1505 93-2378 93-2712]
9/26/94	ORDER: Argument set for Tuesday, October 18, 1994 at 10:00 a.m. Each side limited to 15 minutes. [93-1505, 93-2378, 93-2712] [645842-1] (broo) [93-1505 93-2378 93-2712]
10/7/94	Filed Petitioner Union Pacific in 93-1505, Petitioner Southern Pacific in 93-1505, Petitioner Norfolk & Western in 93-1505, Petitioner Norfolk Southern in 93-1505, Petitioner IL Central Railroad in 93-1505, Petitioner CSX Transportation in 93-1505, Petitioner Consolidated Rail in 93-1505, Petitioner Burlington Northern in 93-1505, Petitioner Atchison, Topeka in 93-1505, Petitioner IL Central Railroad in 93-2378, Petitioner CSX Transportation in 93-2378, Petitioner Consolidated Rail in 93-2378, Petitioner Burlington Northern in 93-2378, Petitioner Atchison, Topeka in 93-2378, Petitioner Norfolk & Western in 93-2378, Petitioner Norfolk Southern in 93-2378, Petitioner Southern Pacific in 93-2378, Petitioner Union Pacific in 93-2378, Petitioner Atchison, Topeka in 93-2712, Petitioner Burlington Northern in 93-2712, Petitioner Consolidated Rail in 93-2712, Petitioner CSX Transportation in 93-2712, Petitioner IL Central Railroad in 93-2712, Petitioner Norfolk & Western in 93-2712, Petitioner Norfolk Southern in 93-2712, Petitioner Southern Pacific in 93-2712 Citation of Additional Authority, per CR 28(j). Dist. [93-1505, 93-2378, 93-2712] [649692-1] (patb) [93-1505 93-2378 93-2712]

DATE	PROCEEDINGS
10/18/94	Case heard and taken under advisement by panel: Enbanc [93-1505, 93-2378, 93-2712] [662540-1] (broo) [93-1505 93-2378 93-2712]
10/18/94	Case argued by Ronald M. Johnson for Petitioner Atchison, Topeka, Petitioner Burlington Northern, Petitioner Consolidated Rail, Petitioner CSX Transportation, Petitioner IL Central Railroad, Petitioner Norfolk Southern, Petitioner Norfolk & Western, Petitioner Southern Pacific, Petitioner Union Pacific in 93-1505, John F. Daly for Respondent Federico Pena, Respondent TRAN, Respondent S. Mark Lindsey, Respondent Federal Railroad in 93-1505, Ronald M. Johnson for Petitioner Union Pacific, Petitioner Southern Pacific, Petitioner Norfolk Southern, Petitioner Norfolk & Western, Petitioner Atchison, Topeka, Petitioner Burlington Northern, Petitioner Consolidated Rail, Petitioner CSX Transportation, Petitioner IL Central Railroad in 93-2378, John F. Daly for Respondent TRAN in 93-2378, Laurence M. Mann for Respondent TRAN, Respondent Brohd Locomotive, Respondent United Trans Union in 93-2378, Lawrence M. Mann for Respondent Federal Railroad, Respondent Grady C. Cothen, Respondent TRAN, Respondent Federico Pena in 93-2712, John F. Daly for Respondent Federal Railroad, Respondent Grady C. Cothen, Respondent TRAN, Respondent Federico Pena in 93-2712, Ronald M. Johnson for Petitioner Southern Pacific, Petitioner Norfolk Southern, Petitioner Norfolk & Western, Petitioner IL Central Railroad, Petitioner CSX Transportation, Petitioner Consolidated Rail, Petitioner Burlington Northern, Petitioner Atchison, Topeka in 93-2712. [93-1505, 93-2378, 93-2712] (broo) [93-1505 93-2378 93-2712]
12/6/94	Filed oversized record in Section # 40 of exhibit room: 1 box containing assorted briefs. [510209-1] [93-1505, 93-2378, 93-2712] (cove) [93-1505 93-2378 93-2712]

DATE	PROCEEDINGS
12/29/94	Filed opinion of the court by Judge Bauer. The petitions for review of the railroads are GRANTED and the orders of the Federal Railroad Administration are VACATED. Enbanc, Posner, concurring, Easterbrook, concurring, Manion, concurring. (The Hon. Walter J. Cummings did not participate in the argument or decision in this case.) [93-1505, 93-2378, 93-2712] [510209-1] (patb) [93-1505 93-2378 93-2712]
12/29/94	ORDER: Final judgment filed per opinion. With costs: y. [93-1505, 93-2378, 93-2712] [678052-1] (patb) [93-1505 93-2378 93-2712]
1/18/95	Filed motion by Respondent FRA in 93-1505, Respondent TRAN in 93-1505, Respondent TRAN in 93-2378, Respondent TRAN in 93-2712, Respond FRA in 93-2712 to stay the mandate. [684347-1] [93-1505, 93-2378, 93-2712] (elea) [93-1505 93-2378 93-2712]
1/19/95	Filed Petitioner Union Pacific in 93-1505, Petitioner Southern Pacific in 93-1505, Petitioner Norfolk & Western in 93-1505, Petitioner Norfolk Southern in 93-1505, Petitioner IL Central Railroad in 93-1505, Petitioner CSX Transportation in 93-1505, Petitioner Consolidated Rail in 93-1505, Petitioner Burlington Northern in 93-1505, Petitioner Atchison, Topeka in 93-1505, Petitioner IL Central Railroad in 93-2378, Petitioner CX Transportation in 93-2378, Petitioner Consolidated Rail in 93-2378, Petitioner Burlington Northern in 93-2378, Petitioner Atchison, Topeka in 93-2378, Petitioner Norfolk & Western in 93-2378, Petitioner Norfolk Southern in 93-2378, Petitioner Southern Pacific in 93-2378, Petitioner Union Pacific in 93-2378, Petitioner Atchison, Topeka in 93-2712, Petitioner Burlington Northern in 93-2712, Petitioner Consolidated Rail in 93-2712, Petitioner CSX Transportation in 93-2712, Petitioner IL Central Railroad in 93-2712, Petitioner Norfolk & Western in 93-2712, Petitioner Norfolk Southern in 93-2712, Petitioner Southern Pacific in 93-2712 response to Respondent FRA in 93-1505, Respondent TRAN in 93-1505, Respondent TRAN in 93-2378, Respondent TRAN 93-2712, Respondent FRA in 93-2712 motion to stay the mandate. [684805-1] [93-1505, 93-2378, 23-2712] [684805-1] (elea) [93-1505 93-2378 93-2712]

DATE	PROCEEDINGS
1/20/95	ORDER issued GRANTING motion to stay the mandate. The mandate is STAYED to and including 2/19/95. [684347-1] [684805-1] in 93-1505, 93-2378, 93-2712 AM [93-1505, 93-2378, 93-2712] (carl) [93-1505 93-2378 93-2712]
2/27/95	AGENCY CLOSING LETTER ISSUED WITH BILL OF COSTS IN THE AMOUNT OF $73.15. RECORD TO BE RETURNED LATER. (Contents to be returned: 2 envelopes administrative record.) [93-1505, 93-2378, 93-2712] [684805-1] (jonp) [93-1505 93-2378 93-2712]
3/3/95	The court, on its own motion, VACATES the Bill of Costs issued in 2/27/95 in the amount of $73.15. [497798-1] AK [93-1505, 93-2378, 93-2712] (jonp) [93-1505 93-2378 93-2712]
3/6/95	Filed instanter motion by Petitioner Atchison, Topeka, et al., in 93-1505, Petitioner Atchison, Topeka, et al., in 93-2378, Petitioner Atchison, Topeka, et al., in 93-2712 to file bill of costs. (WITHDRAWN per 3/10/95 order.) [700477-1] [93-1505, 93-2378, 93-2712] [700477-1] (patb) [93-1505 93-2378 93-2712]
3/7/95	Filed motion by Petitioner Atchison, Topeka, et al., in 93-1505, Petitioner Atchison, Topeka, et al., in 93-2378, Petitioner Atchison, Topeka, et al., in 93-2712 to withdraw motion for bill of costs instanter. [701670-1] [93-1505, 93-2378, 93-2712] (patb) [93-1505 93-2378 93-2712]

DATE	PROCEEDINGS
3/10/95	ORDER issued GRANTING motion to withdraw and "PETITIONERS' MOTION TO FILE BILL OF COSTS INSTANTER", filed on 3/6/95, is WITHDRAWN. [701670-1] [700477-1] AK [93-1505, 93-2378, 93-2712] (patb) [93-1505 93-2378 93-2712]
4/3/95	Filed notice from the Supreme Court of the filing of a Petition for Writ of Certiorari. Supreme Court Case No.: 94-1592. [93-1505, 93-2378, 93-2712] [709776-1] (jame) [93-1505 93-2378 93-2712]
6/22/95	Filed order from the Supreme Court GRANTING the Petition for Writ of Certiorari. Supreme Court Case No.: 94-1592. [93-1505, 93-2378, 93-2712] [737067-1] (carl) [93-1505 93-2378 93-2712]
	Case No. 93-2712
7/16/93	Petition for Review docketed. Filed Original and 3 copies of petitioner's Petition for Review. [93-2712] [510209-1] Appearance form due on 8/16/93 for Lawrence M. Mann, for Billie Ann Stultz, for Daniel C. Smith, for David Herbert Kasminoff, for John F. Daly, for Rosalind A. Knapp, for Janet Reno, for Mark V. Holden, for Ronald M. Johnson. Agency record or cert. list due on 8/25/93 for Federico Pena, for Department Transport, for Grady C. Cothen, for Federal Railroad. (cfre) [93-2712]
7/16/93	Filed clerk's copy of notice of service on counsel for respondent. [93-2712] [510209-1] (cfre) [93-2712]
7/16/93	Filed motion by Petitioners Atchison, Topeka, Burlington Northern, Consolidated Rail, CSX Transportation, IL Central Railroad, Norfolk & Western, Norfolk Southern, and Southern Pacific

DATE	PROCEEDINGS
	to consolidate cases. [510240-1] [93-2712] (cfre) [93-2712]
7/21/93	ORDER: The court orders these appeals [93-1505, 93-2378, 93-2712] CONSOLIDATED for purposes of briefing and disposition. Record preparation and briefing on the merits shall proceed in accordance with Fed. R. App. P. 17 and 31. [510209-1] (patb) [93-1505 93-2378 93-2712]
7/23/93	Appearance form filed by attorney(s) Mark V. Holden in 93-2712, Ronald M. Johnson in 93-2712 for Petitioner Atchison, Topeka in 93-2712, Petitioner Burlington Northern in 93-2712, Petitioner Consolidated Rail in 93-2712, Petitioner CSX Transportation in 93-2712, Petitioner IL Central Railroad in 93-2712, Petitioner Norfolk & Western in 93-2712, Petitioner Norfolk Southern in 93-2712, Petitioner Southern Pacific in 93-2712. [93-2712] [510209-1] (elea) [93-2712]
7/26/93	Appearance form filed by attorney(s) Billie Ann Stultz in 93-2712, Daniel C. Smith in 93-2712, David Herbert Kasminoff in 93-2712 for Respondent Federal Railroad in 93-2712. [93-2712] [510209-1] (patb) [93-2712]
7/29/93	Added attorney Steven M. Weisbaum in 93-2712 for Respondent Federico Pena in 93-2712, Respondent TRAN in 93-2712, Respondent Grady C. Cothen in 93-2712, Respondent Federal Railroad in 93-2712, per appearance form. (patb) [93-2712]
7/29/93	Appearance form filed by attorney(s) Steven M. Weisbaum in 93-2712, Lawrence M. Mann in 93-2712 for Respondent Federico Pena in 93-2712, Respondent TRAN in 93-2712, Respondent Grady C. Cothen in 93-2712, Respondent Federal Railroad in 93-2712. [93-2712] [510209-1] (patb) [93-2712]

DATE	PROCEEDINGS
8/13/93	Added attorney Malcolm L. Stewart per appearance form. Appearance form filed for Respondent Federico Pena in 93-2712, Respondent TRAN in 93-2712, Respondent Grady C. Cothen in 93-2712, Respondent Federal Railroad in 93-2712 by attorney Malcolm L. Stewart in 93-2712, John F. Daly in 93-2712. [93-2712] [510209-1] (cint) [93-2712]
8/25/93	Certified List filed by Respondent Federal Railroad in 93-1505, Respondent TRAN in 93-2378, Respondent Federal Railroad in 93-2712 . [93-1505, 93-2378, 93-2712] [521232-1] The first brief in this appeal is due 10/4/93 for Atchison, Topeka in 93-1505, for Burlington Northern in 93-1505, for Consolidated Rail in 93-1505, for CSX Transportation in 93-1505, for IL Central Railroad in 93-1505, for Norfolk Southern in 93-1505, for Norfolk and Western in 93-1505, for Southern Pacific in 93-1505, for Union Pacific in 93-1505, for Union Pacific in 93-2378, for Southern Pacific in 93-2378, for Norfolk Southern in 93-2378, for Norfolk & Western in 93-2378, for Atchison, Topeka in 93-2378, for Burlington Northern in 93-2378, for Consolidated Rail in 93-2378, for CSX Transportation in 93-2378, for IL Central Railroad in 93-2378, for Southern Pacific in 93-2712, for Norfolk Southern in 93-2712, for Norfolk & Western in 93-2712, for IL Central Railroad in 93-2712, for CSX Transportation in 93-2712, for Consolidated Rail in 93-2712, for Burlington Northern in 93-2712, for Atchison, Topeka in 93-2712. (eric) [93-1505 93-2378 93-2712]
10/5/93	Brief deficiency letter sent to Petitioner Union Pacific in 93-1505, Petitioner Southern Pacific in 93-1505, Petitioner Norfolk & Western in 93-1505, Petitioner Norfolk Southern in 93-1505, Petitioner IL Central Railroad in 93-1505, Petitioner CSX Transportation in 93-1505, Petitioner Consolidated Rail in 93-1505, Petitioner Burlington Northern

DATE	PROCEEDINGS
	in 93-1505, Petitioner Atchison, Topeka in 93-1505, Petitioner IL Central Railroad in 93-2378, Petitioner CSX Transportation in 93-2378, Petitioner Consolidated Rail in 93-2378, Petitioner Burlington Northern in 93-2378, Petitioner Atchison, Topeka in 92-2378, Petitioner Norfolk & Western in 93-2378, Petitioner Norfolk Southern in 93-2378, Petitioner Southern Pacific in 93-2378, Petitioner Union Pacific in 93-2378, Petitioner Atchison, Topeka in 93-2712, Petitioner Burlington Northern in 93-2712, Petitioner Consolidated Rail in 93-2712, Petitioner CSX Transportation in 93-2712, Petitioner IL Central Railroad in 93-2712, Petitioner Norfolk & Western in 93-2712, Petitioner Norfolk Southern in 93-2712, Petitioner Southern Pacific in 93-2712 [510209-1] [93-1505, 93-2378, 93-2712] (duda) [93-1505 93-2378 93-2712]
10/12/93	Filed instanter motion by Petitioner Union Pacific in 93-1505, Petitioner Southern Pacific in 93-1505, Petitioner Norfolk & Western in 93-1505, Petitioner Norfolk Southern in 93-1505, Petitioner IL Central Railroad in 93-1505, Petitioner CSX Transportation in 93-1505, Petitioner Consolidated Rail in 93-1505, Petitioner Burlington Northern in 93-1505, Petitioner Atchison, Topeka in 93-1505, Petitioner IL Central Railroad in 93-2378, Petitioner CSX Transportation in 93-2378, Petitioner Consolidated Rail in 93-2378, Petitioner Burlington Northern in 93-2378, Petitioner Atchison, Topeka in 93-2378, Petitioner Norfolk & Western in 93-2378, Petitioner Norfolk Southern in 93-2378, Petitioner Southern Pacific in 93-2378, Petitioner Union Pacific in 93-2378, Petitioner Atchison, Topeka in 93-2712, Petitioner Burlington Northern in 93-2712, Petitioner Consolidated Rail in 93-2712, Petitioner CSX Transportation in 93-2712, Petitioner IL Central Railroad in 93-2712, Petitioner Norfolk & Western in 93-2712, Petitioner Norfolk Southern in 93-2712, Petitioner Southern

DATE	PROCEEDINGS
	Pacific in 93-2712 to file first brief in agency appeal. [536122-1]. 15c petitioner's brief 10c appendix tendered. [536122-1] [93-1505, 93-2378, 93-2712] (roxa) [93-1505 93-2378 93-2712]
10/12/93	ORDER issued GRANTING instanter motion to file first brief in agency appeal. [536122-1] in 93-1505, 93-2378, 93-2712 The clerk of this court is directed to file instanter the tendered copies of the petitioners' consolidated brief. [93-1505, 93-2378, 93-2712] [536122-1] 1. The second agency brief is due 11/12/93 for Federico Pena in 93-1505, for TRAN in 93-1505, for S. Mark Lindsey in 93-1505, for Federal Railroad in 93-1505, for Brohd Locomotive in 93-1505, for United Transportatio in 93-1505, for TRAN in 93-2378, for Brohd Locomotive in 93-2378, for United Trans Union in 93-2378, for Federal Railroad in 93-2712, for Grady C. Cothen in 93-2712, for TRAN in 93-2712, for Federico Pena in 93-2712. 2. The reply brief, if any, is due 11/26/93 for Atchison, Topeka in 93-1505, for Burlington Northern in 93-1505, for Consolidated Rail in 93-1505, for CSX Transportation in 93-1505, for IL Central Railroad in 93-1505, for Norfolk Southern in 93-1505, for Norfolk & Western in 93-1505, for Southern Pacific in 93-1505, for Union Pacific in 93-1505, for Union Pacific in 93-2378, for Southern Pacific in 93-2378, for Norfolk Southern in 93-2378, for Norfolk & Western in 93-2378, for Atchison, Topeka in 93-2378, for Burlington Northern in 93-2378, for Consolidated Rail in 93-2378, for CSX Transportation in 93-2378, for IL Central Railroad in 93-2378, for Southern Pacific in 93-2712, for Norfolk Southern in 93-2712, for Norfolk & Western in 93-2712, for IL Central Railroad in 93-2712, for CSX Transportation in 93-2712, for Consolidated Rail in 93-2712, for Burlington Northern in 93-2712, for Atchison, Topeka in 93-2712. (elea) [93-1505 93-2378 93-2712]

DATE	PROCEEDINGS
10/12/93	Filed 15c agency #1 brief by Petitioner Union Pacific, et al., in 93-1505, 93-2378 and 93-2712, per order. [93-1505, 93-2378, 93-2712] [536413-1] (carl) [93-1505 93-2378 93-2712]
10/12/93	Filed 10c appendix by Petitioner Union Pacific, et al., in 93-1505, 93-2378 and 93-2712, per order. [93-1505, 93-2378, 93-2712] [536420-1] (carl) [93-1505 93-2378 93-2712]
10/15/93	Filed oversize exhibit in Section 40 of exhibit room. Number of boxes: 1 (briefs; appendix) [93-1505, 93-2378, 93-2712] [510209-1] (cove) [93-1505 93-2378 93-2712]
10/18/93	Filed motion by Respondent United Transportatio in 93-1505, Respondent Brohd Locomotive in 93-1505, Respondent United Trans Union in 93-2378, Respondent Brohd Locomotive in 93-2378 for summary affirmance. [537863-1] [93-1505, 93-2378] (roxa) [93-1505 93-2378]
10/22/93	Filed Petitioner Union Pacific in 93-1505, Petitioner Southern Pacific, et al. in 93-1505, 93-2378 and 93-2712. response to Respondent United Transportatio in 93-1505, Respondent Locomotive in 93-1505, Respondent United Trans Union in 93-2378, Respondent Brohd Locomotive in 93-2378 motion for summary affirmance. [539615-1] [93-1505, 93-2378, 93-2712] [539615-1] (carl) [93-1505 93-2378 93-2712
11/3/93	Filed motion by Respondent Federal Railroad in 93-1505, Respondent S. Mark Lindsey in 93-1505, Respondent TRAN in 93-1505, Respondent Federico Pena in 93-1505, Respondent TRAN in 93-2378, Respondent Federico Pena in 93-2712, Respondent TRAN in 93-2712, Respondent Grady C. Cothen in 93-2712, Respondent Federal Railroad in 93-2712 to extend time to file second brief in agency appeal. [542750-1] [93-1505, 93-2378, 93-2712] (jess) [93-1505 93-2378 93-2712]

DATE	PROCEEDINGS
11/5/93	ORDER issued GRANTING motion for extension of time to file second brief in agency appeal. [542750-1] in 93-1505, 93-2378, 93-2712 [93-1505, 93-2378, 93-2712] 1. The second brief is due 12/3/93 for Federico Pena in 93-1505, for TRAN in 93-1505, for S. Mark Lindsey in 93-1505, for Federal Railroad in 93-1505, for Brohd Locomotive in 93-1505, for United Transportatio in 93-1505, for TRAN in 93-2378, for Brohd Locomotive in 93-2378, for United Trans Union in 93-2378, for Federal Railroad in 93-2712, for Grady C. Cothen in 93-2712, for TRAN in 93-2712, for Federico Pena in 93-2712. 2. The consolidated reply brief, if any, is due 12/17/93 for Atchison, Topeka in 93-1505, for Burlington Northern in 93-1505, for Consolidated Rail in 93-1505, for CSX Transportation in 93-1505, for IL Central Railroad in 93-1505, for Norfolk Southern in 93-1505, for Norfolk & Western in 93-1505, for Southern Pacific in 93-1505, for Union Pacific in 93-1505, for Union Pacific in 93-2378, for Southern Pacific in 93-2378, for Norfolk Southern in 93-2378, for Norfolk & Western in 93-2378, for Atchison, Topeka in 93-2378, for Burlington Northern in 93-2378, for Consolidated Rail in 93-2378, for CSX Transportation in 93-2378, for IL Central Railroad in 93-2378, for Southern Pacific in 93-2712, for Norfolk Southern in 93-2712, for Norfolk & Western in 93-2712, for IL Central Railroad in 93-2712, for CSX Transportation in 93-2712, for Rail in 93-2712, for Burlington Northern in 93-2712, for Atchison, Topeka in 93-2712. (jess) [93-1505 93-2378 93-2712]
11/8/93	ORDER issued DENYING motion for summary affirmance. [537863-1] in 93-1505, 93-2378 [93-1505, 93-2378, 93-2712] (cfre) [93-1505 93-2378 93-2712]
12/3/93	Filed 15c agency #2 brief by Respondent United Transportatio in 93-1505, Respondent Brohd Locomotive in 93-1505, Respondent United Trans Union in 93-2378, Respondent Brohd Locomotive in 93-2378. [93-1505, 93-2378, 93-2712] [552825-1] (patb) [93-1505 93-2378 93-2712]
12/10/93	Filed 15c agency #2 brief by Respondent United Transportatio et. al., in 93-1505, in 93-2712, in 93-2712. [93-1505, 93-2378, 93-2712] [555339-1] (patb) [93-1505 93-2378 93-2712]
12/14/93	Filed motion by Petitioner Atchison, Topeka, et al., in 93-1505, in 93-2378, in 93-2712, to extend time to file reply brief. [555967-1] [93-1505, 93-2378, 93-2712] (patb) [93-1505 93-2378 93-2712]
12/15/93	ORDER issued GRANTING motion for extension of time to file third brief in agency appeal [555967-1] in 93-1505, 93-2378, 93-2712. ak [93-1505, 93-2378, 93-2712] The reply brief, if any, is due 12/23/93 for Atchison, Topeka in 93-1505, in 93-2378, in 93-2712. (patb) [93-1505 93-2378 93-2712]
12/27/93	Filed 15c reply brief by Petitioner Atchison, Topeka, et. al., in 93-1505, in 93-2378, in 93-2712. [93-1505, 93-2378, 93-2712] [560614-1] (patb) [93-1505 93-2378 93-2712]
1/21/94	ORDER: Argument set for Tuesday, Febuary 22, 1994 at 9:30 a.m. 20 minutes to Santa Fe and 20 minutes to Federal Railroad Admin. and union. [93-1505, 93-2378, 93-2712] [566785-1] (broo) [93-1505 93-2378 93-2712]
2/22/94	Case heard and taken under advisement by panel: Circuit Judge William J. Bauer, Circuit Judge Daniel A. Manion, Chief Judge J. P. Gilbert. [93-1505, 93-2378, 93-2712] [576856-1] (broo) [93-1505 93-2378 93-2712]
2/22/94	Case argued by Ronald M. Johnson for Petitioner Atchison, Topeka, Petitioner Burlington North-

DATE	PROCEEDINGS
	ern, Petitioner Consolidated Rail, Petitioner CSX Transportation, Petitioner IL Central Railroad, Petitioner Norfolk Southern, Petitioner Norfolk & Western, Petitioner Southern Pacific, Petitioner Union Pacific in 93-1505, John F. Daly for Respondent Federico Pena, Respondent TRAN, Respondent S. Mark Lindsey, Respondent Federal Railroad in 93-1505, Ronald M. Johnson for Petitioner Union Pacific, Petitioner Southern Pacific, Petitioner Norfolk Southern, Petitioner Norfolk & Western, Petitioner Atchison, Topeka, Petitioner Burlington Northern, Petitioner Consolidated Rail, Petitioner CSX Transportation, Petitioner IL Central Railroad in 93-2378, John F. Daly for Respondent TRAN in 93-2378, John F. Daly for Respondent Federal Railroad, Respondent Grady C. Cothen, Respondent TRAN, Respondent Federico Pena in 93-2712, Ronald M. Johnson for Petitioner Southern Pacific, Petitioner Norfolk Southern, Petitioner Norfolk & Western, Petitioner IL Central Railroad, Petitioner CSX Transportation, Petitioner Consolidated Rail, Petitioner Burlington Northern, Petitioner Atchison, Topeka in 93-2712. [93-1505, 93-2378, 93-2712] [463891-1] (broo) [93-1505 93-2378 93-2712]
2/24/94	Agency record on appeal filed. Contents of record: 1 envelope administrative record. [93-1505, 93-2378, 93-2712] [577965-1] (chuc) [93-1505 93-2378 93-2712]
3/8/94	Supplemental record on appeal filed. Contents of record: 1 envelope Administrative record. [93-1505, 93-2378, 93-2712] [20188-1] (chuc) [93-1505 93-2378 93-2712]
7/13/94	Filed opinion of the court by Judge Gilbert. AFFIRMED. Bauer, dissenting, Manion, Gilbert, [93-1505, 93-2378, 93-2712] [510209-1] (patb) [93-1505 93-2378 93-2712]

DATE	PROCEEDINGS
7/13/94	ORDER: Final judgment filed per opinion. With costs: y. [93-1505, 93-2378, 93-2712] [622115-1] (patb) [93-1505 93-2378 93-2712]
7/21/94	Filed Respondent Federal Railroad in 93-1505, Respondent S. Mark Lindsey in 93-1505, Respondent TRAN in 93-1505, Respondent Federico Pena in 93-1505, Respondent TRAN in 93-2378, Respondent Federico Pena in 93-2712, Respondent TRAN in 93-2712, Respondent Grady C. Cothen in 93-2712, Respondent Federal Railroad in 93-2712 Bill of Costs in the amount of $73.15. [93-1505, 93-2378, 93-2712] [510209-1] (eric) [93-1505 93-2378 93-2712]
7/27/94	Filed instanter motion by Petitioner Union Pacific in 93-1505, Petitioner Southern Pacific in 93-1505, Petitioner Norfolk & Western in 93-1505, Petitioner Norfolk Southern in 93-1505, Petitioner IL Central Railroad in 93-1505, Petitioner CSX Transportation in 93-1505, Petitioner Consolidated Rail in 93-1505, Petitioner Burlington Northern in 93-1505, Petitioner Atchison, Topeka in 93-1505, Petitioner IL Central Railroad in 93-2378, Petitioner CSX Transportation in 93-2378, Petitioner Consolidated Rail in 93-2378, Petitioner Burlington Northern in 93-2378, Petitioner Atchison, Topeka in 93-2378, Petitioner Norfolk & Western in 93-2378, Petitioner Norfolk Southern in 93-2378, Petitioner Southern Pacific in 93-2378, Petitioner Union Pacific in 93-2378, Petitioner Atchison, Topeka in 93-2712, Petitioner Burlington Northern in 93-2712, Petitioner Consolidated Rail in 93-2712, Petitioner CSX Transportation in 93-2712, Petitioner IL Central Railroad in 93-2712, Petitioner Norfolk & Western in 93-2712, Petitioner Norfolk Southern in 93-2712, Petitioner Southern Pacific in 93-2712 to file Petition for Rehearing Enbanc. [626371-1] 25 petitioners' Enbanc Petition for Rehearing tendered. [626371-

DATE	PROCEEDINGS
	1] [93-1505, 93-2378, 93-2712] (patb) [93-1505 93-2378 93-2712]
7/27/94	Filed 25c Petition for Rehearing with Suggestion for Rehearing Enbanc by Petitioner Union Pacific in 93-1505, Petitioner Southern Pacific in 93-1505, Petitioner Norfolk & Western in 93-1505, Petitioner Norfolk Southern in 93-1505, Petitioner IL Central Railroad in 93-1505, Petitioner CSX Transportation in 93-1505, Petitioner Consolidated Rail in 93-1505, Petitioner Burlington Northern in 93-1505, Petitioner Atchison, Topeka in 93-1505, Petitioner IL Central Railroad in 93-2378, Petitioner CSX Transportation in 93-2378, Petitioner Consolidated Rail in 93-2378, Petitioner Burlington Northern in 93-2378, Petitioner Atchison, Topeka in 93-2378, Petitioner Norfolk & Western in 93-2378, Petitioner Norfolk Southern in 93-2378, Petitioner Southern Pacific in 93-2378, Petitioner Union Pacific in 93-2378, Petitioner Atchison, Topeka in 93-2712, Petitioner Burlington Northern in 93-2712, Petitioner Consolidated Rail in 93-2712, Petitioner CSX Transportation in 93-2712, Petitioner IL Central Railroad in 93-2712, Petitioner Norfolk & Western in 93-2712, Petitioner Norfolk Southern in 93-2712, Petitioner Southern Pacific in 93-2712, per order. Dist. [93-1505, 93-2378, 93-2712] [626608-1] (carl) [93-1505 93-2378 93-2712]
7/28/94	Sent clerk's copy of letter to Respondent United Transportatio in 93-1505, Respondent Brohd Locomotive in 93-1505, Respondent Federal Railroad in 93-1505, Respondent S. Mark Lindsey in 93-1505, Respondent TRAN in 93-1505, Respondent Federico Pena in 93-1505, Respondent TRAN in 93-378, Respondent Federico Pena in 93-2712, Respondent TRAN in 93-2712, Respondent Grady C. Cothen in 93-2712, Respondent Federal Railroad in 93-2712 requesting 25c of their Answer to the

DATE	PROCEEDINGS
	Petition for Rehearing with Suggestion for Rehearing Enbanc filed by the petitioners' on 7/27/94. [93-1505, 93-2378, 93-2712] [626633-1] Answer to Petition for Enbanc Rehearing due 8/11/94 for Federico Pena in 93-1505, for TRAN in 93-1505, for S. Mark Lindsey in 93-1505, for Federal Railroad in 93-1505, for Brohd Locomotive in 93-1505, for United Transportatio in 93-1505, for TRAN in 93-2378, for Federal Railroad in 93-2712, for Grady C. Cothen in 93-2712, for TRAN in 93-2712, for Federico Pena in 93-2712. (carl) [93-1505 93-2378 93-2712]
7/28/94	ORDER issued GRANTING instanter motion to file Petition for Rehearing Enbanc. [626371-1] in 93-1505, 93-2378, 93-2712 The clerk of this court is directed to file instanter the tendered copies of the Petition for Rehearing with Suggestion for Rehearing En Banc. [626371-1] ak [93-1505, 93-2378, 93-2712] (conw) [93-1505 93-2378 93-2712]
8/11/94	Filed 25c Answer of Respondent Federal Railroad in 93-1505, Respondent S. Mark Lindsey in 93-1505, Respondent TRAN in 93-1505, Respondent Federico Pena in 93-1505, Respondent TRAN in 93-2378, Respondent Federico Pena in 93-2712, Respondent TRAN in 93-2712, Respondent Grady C. Cothen in 93-2712, Respondent Federal Railroad in 93-2712 to Petition for Rehearing with Suggestion for Rehearing Enbanc, per order. Dist. [93-1505, 93-2378, 93-2712] [631311-1) (elea) [93-1505 93-2378 93-2712]
8/11/94	Filed Respondent United Transportatio in 93-1505, Respondent Brohd Locomotive in 93-1505, Respondent United Trans Union in 93-2378, Respondent Brohd Locomotive in 93-2378, opposition to Petitioner Union Pacific et al., Petition for Rehearing En Banc. [93-1505, 93-2378, 93-2712] [510209-1] (carl) [93-1505 93-2378 93-2712]

DATE	PROCEEDINGS
8/30/94	ORDER: Petitioners Union Pacific, et al. in 93-1505, Petitioners IL Central Railroad, et al. in 93-2378, Petitioners Atchison, Topeka, et al. in 93-2712 Petition for Rehearing with Suggestion for Rehearing Enbanc is GRANTED. IT IS FURTHER ORDERED that the judgment and opinion entered in this case on 7/13/94 be VACATED. This case will be reheard en banc at the convenience of the court. The Honorable Walter J. Cummings did not participate in the consideration or decision of this Petition for Rehearing En Banc. [93-1505, 93-2378, 93-2712] (jonp) [93-1505 93-2378 93-2712]
9/26/94	ORDER: Argument set for Tuesday, October 18, 1994 at 10:00 a.m. Each side limited to 15 minutes. [93-1505, 93-2378, 93-2712] [645842-1] (broo) [93-1505 93-2378 93-2712]
10/7/94	Filed Petitioner Union Pacific in 93-1505, Petitioner Southern Pacific in 93-1505, Petitioner Norfolk & Western in 93-1505, Petitioner Norfolk Southern in 93-1505, Petitioner IL Central Railroad in 93-1505, Petitioner CSX Transportation in 93-1505, Petitioner Consolidated Rail in 93-1505, Petitioner Burlington Northern in 93-1505, Petitioner Atchison, Topeka in 93-1505, Petitioner IL Central Railroad in 93-2378, Petitioner CSX Transportation in 93-2378, Petitioner Consolidated Rail in 93-2378, Petitioner Burlington Northern in 93-2378, Petitioner Atchison, Topeka in 93-2378, Petitioner Norfolk & Western in 93-2378, Petitioner Norfolk Southern in 93-2378, Petitioner Southern Pacific in 93-2378, Petitioner Union Pacific in 93-2378, Petitioner Atchison, Topeka in 93-2712, Petitioner Burlington Northern in 93-2712, Petitioner Consolidated Rail in 93-2712, Petitioner CSX Transportation in 93-2712, Petitioner IL Central Railroad in 93-2712, Petitioner Norfolk & Western in 93-2712, Petitioner Norfolk Southern in 93-2712, Petitioner Southern Pacific in 93-2712 Citation of Additional Authority, per CR 28(j). Dist. [93-1505, 93-2378, 93-2712] [649692-1] (patb) [93-1505 93-2378 93-2712]

DATE	PROCEEDINGS
10/18/94	Case heard and taken under advisement by panel: Enbanc [93-1505, 93-2378, 93-2712] [662540-1] (broo) [93-1505 93-2378 93-2712]
10/18/94	Case argued by Ronald M. Johnson for Petitioner Atchison, Topeka, Petitioner Burlington Northern, Petitioner Consolidated Rail, Petitioner CSX Transportation, Petitioner IL Central Railroad, Petitioner Norfolk Southern, Petitioner Norfolk & Western, Petitioner Southern Pacific, Petitioner Union Pacific in 93-1505, John F. Daly for Respondent Federico Pena, Respondent TRAN, Respondent S. Mark Lindsey, Respondent Federal Railroad in 93-1505, Ronald M. Johnson for Petitioner Union Pacific, Petitioner Southern Pacific, Petitioner Norfolk Southern, Petitioner Norfolk & Western, Petitioner Atchison, Topeka, Petitioner Burlington Northern, Petitioner Consolidated Rail, Petitioner CSX Transportation, Petitioner IL Central Railroad in 93-2378, John F. Daly for Respondent TRAN in 93-2378, Lawrence M. Mann for Respondent TRAN, Respondent Brohd Locomotive, Respondent United Trans Union in 93-2378, Lawrence M. Mann for Respondent Federal Railroad, Respondent Grady C. Cothen, Respondent TRAN, Respondent Federico Pena in 93-2712, John F. Daly for Respondent Federal Railroad, Respondent Grady C. Cothen, Respondent TRAN, Respondent Federico Pena in 93-2712, Ronald M. Johnson for Petitioner Southern Pacific, Petitioner Norfolk Southern, Petitioner Norfolk & Western, Petitioner IL Central Railroad, Petitioner CSX Transportation, Peti-

DATE	PROCEEDINGS
	tioner Consolidated Rail, Petitioner Burlington Northern, Petitioner Atchison, Topeka in 93-2712. [93-1505, 93-2378, 93-2712] [510209-1] (broo) [93-1505 93-2378 93-2712]
12/6/94	Filed oversized record in Section #40 of exhibit room: 1 box containing assorted briefs. [510209-1] [93-1505, 93-2378, 93-2712] (cove) [93-1505 93-2378 93-2712]
12/29/94	Filed opinion of the court by Judge Bauer. The petitions for review of the railroads are GRANTED and the orders of the Federal Railroad Administration are VACATED. Enbanc, Posner, concurring, Easterbrook, concurring, Manion, concurring. (The Hon. Walter J. Cummings did not participate in the argument or decision in this case.) [93-1505, 93-2378, 93-2712] [510209-1] (patb) [93-1505 93-2378 93-2712]
12/29/94	ORDER: Final judgment filed per opinion. With costs: y. [93-1505, 93-2378, 93-2712] [678052-1] (patb) [93-1505 93-2378 93-2712]
1/18/95	Filed motion by Respondent FRA in 93-1505, Respondent TRAN in 93-1505, Respondent TRAN in 93-2378, Respondent TRAN in 93-2712, Respondent FRA in 93-2712 to stay the mandate. [684347-1] [93-1505, 93-2378, 93-2712] (elea) [93-1505 93-2378 93-2712]
1/19/95	Filed Petitioner Union Pacific in 93-1505, Petitioner Southern Pacific in 93-1505, Petitioner Norfolk & Western in 93-1505, Petitioner Norfolk Southern in 93-1505, Petitioner IL Central Railroad in 93-1505, Petitioner CSX Transportation in 93-1505, Petitioner Consolidated Rail in 93-1505, Petitioner Burlington Northern in 93-1505, Petitioner Atchison, Topeka in 93-1505, Petitioner IL Central Railroad in 93-2378, Petitioner CSX Transportation in 93-2378, Petitioner Consolidated

DATE	PROCEEDINGS
	Rail in 93-2378, Petitioner Burlington Northern in 93-2378, Petitioner Atchison, Topeka in 93-2378, Petitioner Norfolk & Western in 93-2378, Petitioner Norfolk Southern in 93-2378, Petitioner Southern Pacific in 93-2378, Petitioner Union Pacific in 93-2378, Petitioner Atchison, Topeka in 93-2712, Petitioner Burlington Northern in 93-2712, Petitioner Consolidated Rail in 93-2712, Petitioner CSX Transportation in 93-2712, Petitioner IL Central Railroad in 93-2712, Petitioner Norfolk & Western in 93-2712, Petitioner Norfolk Southern in 93-2712, Petitioner Southern Pacific in 93-2712 response to Respondent FRA in 93-1505, Respondent TRAN in 93-1505, Respondent TRAN in 93-2378, Respondent TRAN in 93-2712, Respondent FRA in 93-2712 motion to stay the mandate. [684805-1] [93-1505, 93-2378, 93-2712] [684805-1] (elea) [93-1505 93-2378 93-2712]
1/20/95	ORDER issued GRANTING motion to stay the mandate. The mandate is STAYED to and including 2/19/95. [684347-1] [684805-1] in 93-1505, 93-2378, 93-2712 AM [93-1505, 93-2378, 93-2712] (carl) [93-1505 93-2378 93-2712]
2/27/95	AGENCY CLOSING LETTER ISSUED WITH BILL OF COSTS IN THE AMOUNT OF $73.15. RECORD TO BE RETURNED LATER. (Contents to be returned: 2 envelopes administrative record.) [93-1505, 93-2378, 93-2712] [684805-1] (jonp) [93-1505 93-2378 93-2712]
3/3/95	The court, on its own motion, VACATES the Bill of Costs issued on 2/27/95 in the amount of $73.15. [497798-1] AK [93-1505, 93-2378, 93-2712] (jonp) [93-1505 93-2378 93-2712]
3/6/95	Filed instanter motion by Petitioner Atchison, Topeka, et al., in 93-1505, Petitioner Atchison, Topeka, et al., in 93-2378, Petitioner Atchison, Topeka, et al., in 93-2712 to file bill of costs.

DATE	PROCEEDINGS
	(WITHDRAWN per 3/10/95 order.) [700477-1] [93-1505, 93-2378, 93-2712] [700477-1] (patb) [93-1505 93-2378 93-2712]
3/7/95	Filed motion by Petitioner Atchison, Topeka, et al., in 93-1505, Petitioner Atchison, Topeka, et al., in 93-2378, Petitioner Atchison, Topeka, et al., in 93-2712 to withdraw motion for bill of costs instanter. [701670-1] [93-1505, 93-2378, 93-2712] (patb) [93-1505 93-2378 93-2712]
3/10/95	ORDER issued GRANTING motion to withdraw and "PETITIONERS' MOTION TO FILE BILL OF COSTS INSTANTER", filed on 3/6/95, is WITHDRAWN. [701670-1] [700477-1] AK [93-1505, 93-2378, 93-2712] (patb) [93-1505 93-2378 93-2712]
4/3/95	Filed notice from the Supreme Court of the filing of a Petition for Writ of Certiorari. Supreme Court Case No.: 94-1592. [93-1505, 93-2378, 93-2712] [709776-1] (jame) [93-1505 93-2378 93-2712]
6/22/95	Filed order from the Supreme Court GRANTING the Petition for Writ of Certiorari. Supreme Court Case No.: 94-1592. [93-1505, 93-2378, 93-2712] [737067-1] (carl) [93-1505 93-2378 93-2712]

INTERSTATE COMMERCE COMMISSION

THE HOURS-OF-SERVICE ACT

(AS AMENDED)

AND ADMINISTRATIVE RULINGS
AND OPINIONS THEREON

[ICC Logo]

Washington
Government Printing Office
1926

CONFERENCE RULINGS ON THE HOURS-OF-SERVICE LAW BY THE COMMISSION

April 7, 1908.

56. HOURS-OF-SERVICE LAW—STREET-CAR COMPANIES.—Upon inquiry whether the hours-of-service law applies to electric street car lines which are interstate carriers: *Held*, That it applies to all railroads subject to the provisions of the act to regulate commerce, as amended, including street railroads when engaged in interstate commerce. (See Rule 287.)

May 5, 1908.

74. HOURS-OF-SERVICE LAW.—Employees deadheading on passenger trains or on freight trains and not required to perform, and not held responsible for the performance of, any service or duty in connection with the movement of the train upon which they are deadheading, are not while so deadheading "on duty" as that phrase is used in the act regulating the hours of labor. (See Rule 287-*b*.)

June 25, 1908.

88. HOURS-OF-SERVICE LAW.—(*a*) The specific proviso of the law in regard to hours of service is:

> "That no operator, train dispatcher, or other employee who by the use of the telegraph or telephone dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four-hour period in all towers, offices, places, and stations continuously operated night and day, nor for a longer period than thirteen hours in all towers, offices, places, and stations operated only during the daytime, except in case of emergency, when the employees named in this proviso may be permitted to be and remain on duty for four additional hours in a twenty-four-hour period on not exceeding three days in any week."

These provisions apply to employees in towers, offices, places, and stations, and do not include train employees who, by the terms of the law, are permitted to be or remain on duty sixteen hours consecutively or sixteen hours in the aggregate in any twenty-four-hour period, and who may occasionally use telegraph or telephone instruments for the receipt or transmission of orders affecting the movement of trains. (See Rule 287.)

(*b*). Section of the law provides that:

> "The provisions of this act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen."

Any employee so delayed may therefore continue on duty to the terminal or end of that run. The proviso quoted removes the application of the law to that trip. (*This ruling rescinded by conference ruling adopted April 9, 1917.*)

November 10, 1908.

108. HOURS-OF-SERVICE LAW—FERRY EMPLOYEES.—The hours-of-service law does not apply to employees on a ferry, even though the ferry be owned by a railroad company. The law applies to employees connected with the movement of trains, and hence does not embrace employees engaged only in the operation of a ferry. This ruling does not apply to car ferries. (See Rule 287.)

BEST AVAILABLE COPY

April 4, 1910.

275. HOURS-OF-SERVICE LAW—TRAIN BAGGAGEMEN. —The provisions of section 1 of the hours-of-service law apply to train baggagemen who are employees of the railway company and who are required by the rules of the company to perform or to hold themselves in readiness, when called upon, to perform any duty connected with the movement of any train. (See Rules 74 and 287.)

March 16, 1908.

287. THE HOURS-OF-SERVICE LAW.—(*a*) The provisions of this act apply to all common carriers by railroad in the District of Columbia, or in any Territory of the United States, or engaged in the movement of interstate or foreign traffic; and to all employees of such common carriers who are engaged in or connected with the movement of any train carrying traffic in the District of Columbia, or in any Territory, or carrying interstate or foreign traffic. (See Rule 56.)

(*b*) SEC. 2. The requirement for ten consecutive hours off duty applies only to such employees as have been on duty for sixteen consecutive hours. The requirement for eight consecutive hours off duty applies only to employees who have not been on duty sixteen consecutive hours, but have been on duty sixteen hours in the aggregate out of a twenty-four-hour period. Such twenty-four-hour period begins at the time the employee first goes on duty after having had at least eight consecutive hours off duty. The term "on duty" includes all the time during which the employee is performing service, or is held responsible for performance of service. An employee goes "on duty" at the time he begins to perform service or at which he is required to be in readiness to perform service, and goes "off duty" at the time he is relieved from service and from responsibility for performance of service. (Qualified by Rule 74.)

(*c*) The act does not specify the classes of employees that are subject to its terms. All employees engaged in

or connected with the movement of any train as described in section 1 are within its scope. Train dispatchers, conductors, engineers, telegraphers, firemen, brakemen, train baggagemen who, by rules of carriers, are required to perform any duty in connection with the movement of trains, yardmen, switch tenders, tower men, block-signal operators, etc., come within the provisions of the statute. (Qualified by Rules 108 and 275; see also Rule 88.)

(*d*) The proviso in section 2 covers every employee who, by the use of the telegraph or telephone, handles orders pertaining to or affecting train movements. In order to preserve the obvious intent of the law this provision must be construed to include all employees who, by the use of an electrical current, handle train orders or signals which control movements of trains. (See Rule 88.)

(*e*) The prime purpose of this law is to secure additional safety by preventing employees from working longer hours than those specified in the act. Therefore a telegraph or telephone operator who is employed in a night and day office may not be required to perform duty in any capacity or of any kind beyond nine hours of total service in any twenty-four hour period.

(*f*) The phrase "towers, offices, places, and stations" is interpreted to mean particular and definite locations. The purpose of the law and of the proviso for nine hours of service may not be avoided by erecting offices, stations, depots, or buildings in close proximity to each other and operating from one a part of the day while the other is closed, and vice versa.

The statute is remedial in its intent and must have a broad construction so that the purpose of the Congress may not be defeated.

(*g*) The Commission interprets the phrase "continuously operated night and day" as applying to all offices, places, and stations operated during a portion of the day

and a portion of the night a total of more than thirteen hours.

The phrase "operated only during the daytime" refers to stations which are operated not to exceed thirteen hours in a twenty-four hour period, and is not considered as meaning that the operator thereat may be employed only during the daytime.

(*h*) The act provides that operators employed at night and day stations or at daytime stations may, in case of emergency, be required to work four additional hours on not exceeding three days in any week. Manifestly, the emergency must be real and one against which the carrier can not guard.

"In any week" is construed to mean in any calendar week, beginning with Sunday.

(*i*) SEC. 3. The instances in which the act will not apply include only such occurrences as could not be guarded against; those which involved no neglect or lack of precaution on the part of the carrier, its agents, or officers; and they serve to waive the application of the law to employees on trains only until such employees, so delayed, reach a terminal or relay point. (*This ruling rescinded by conference ruling adopted April 9, 1917.*)

> "Casualty," like its synonyms "accident" and "misfortune," may proceed or result from negligence or other cause known or unknown. (Words and Phrases Judicially Defined, vol. 2, 1003.)
>
> Act of God. Any accident due to natural causes directly and exclusively without human intervention, such as could not have been prevented by any amount of foresight, and pains, and care reasonable to have been expected. (Bouvier's Law Dictionary, vol. 1, 79.)

(*j*) It will be noted that the penalties for violation of this act are against the "common carriers, or any officer

or agent thereof, requiring or permitting any employee to go, be, or remain on duty" in violation of the law. It is clear that the officers and agents of carriers who are liable to the penalties provided in the act are those who have official direction or control of the employees; and that the penalties do not attach to the employees who, subject to such supervision or control, perform the service prohibited.

(*k*) SEC. 4. To enforce this act the Interstate Commerce Commission has all the powers which have been granted to it for the enforcement of the act to regulate commerce, including authority to appoint employees, to require reports, to examine books, papers, and documents, to administer oats, to issue subpoenas, and to interrogate witnesses.

February 12, 1912.

342. HOURS-OF-SERVICE LAW.—A trainman required by the rules of the carrier, in conjunction with his duties as trainman, to send, receive, or deliver orders affecting the movement of trains comes within the proviso of section 2 of the hours-of-service act, and therefore a carrier may not require a trainman, who has been on duty longer than the limit of time fixed for a telegraph or telephone operator, to send, receive, or deliver orders affecting the movement of trains as a part of the duties regularly assigned to him.

But upon inquiry whether the practice of requiring conductors of trains delayed at stations where there is no regularly assigned telegraph or telephone operator on duty, and conductors of trains about to be overtaken by superior trains, to telephone or telegraph the train despatcher for instructions is in accord with the act and with the Commission's order of interpretation of June 25, 1908, *Held*, That a trainman who has been on duty for more than 9 hours or for more than 13 hours is not prohibited from occasionally using the telegraph or telephone to meet an emergency.

[October 20, 1977, letter to J.R. Snyder from Raymond James]

[Oct. 20, 1977]

Mr. J. R. Snyder
National Legislative Director
United Transportation Union
400 First St., N.W., Suite T9-4
Washington, D.C. 20001

Dear Mr. Snyder:

This will respond to your letter to Mr. Furphy of October 4, 1977, posing two questions concerning the administration and enforcement of the Hours of Service Act (45 U.S.C. 61-64b). Your letter indicated that the questions were originated by United Transportation Union General Chairman J.D. McBride of the Missouri-Kansas-Texas Railroad.

The first question is whether the Hours of Service Act requires that crews whose twelve hours have expired be speedily deadheaded to a designated terminal for rest. As you know, this is a question which the law does not address explicitly. The only case which we have been able to identify which treats this issue is *United States v. Pennsylvania R.R.*, 275 F. Supp. 345 (W.D. Penn. 1967). In that instance crew members were ordered to relieve themselves at the expiration of sixteen hours on duty and were informed that transportation would be provided. Due to heavy snow and low temperatures the crew "could not exercise their right to move freely from the train." A relief crew did not arrive for about three hours. Under these circumstances the court held that the carrier "held five of its employees within its scope of authority and direction for more than (the statutory maximum) and that it did so in violation of 45 U.S.C. § 62."

However, there are real practical problems in applying the rule of *Pennsylvania R.R.* to the wide range of situations in which employees are forced to await deadhead transportation following the expiration of the statutory period. First, the *Pennsyvania R.R.* decision provides no real guidance concerning how much delay is too much or what objective conditions represent an unreasonable restriction on the freedom of crew members, once relieved, to go their own way. Second, carried to its logical conclusion the rule of *Pennsylvania R.R.* would actually tend to promote the unsafe use of fatigued crews beyond the statutory maximum. Faced with the prospect that delays (avoidable or otherwise) in getting relief crews to trains might be viewed by the FRA as violations in themselves, carriers might elect to continue such crews to their destinations. Of course, it is the objective of the statute to deter precisely this conduct.

For the above-stated reasons, and because no concrete detriment to railroad safety is ordinarily involved, FRA has traditionally viewed most delays associated with deadheading as part of time spent in deadhead transportation. We believe that this approach offers the best hope for promoting overall compliance with the law. Of course, no time spent awaiting transportation to a designated terminal could be counted toward a required off duty period.

The second question posed by Mr. McBride asked what pressure FRA could bring to bear to promote humane treatment by encouraging prompt deadheading to a designated terminal. The safety of life and limb is the most fundamental element of humane treatment; and our mandate is to promote safety by enforcing railroad safety statutes and regulations. Government, like any private association, is subject to practical limitations on what it can accomplish. In addition, any agency of government is limited by the authority conferred upon it. The practical and legal limitations under which we work do not

permit us to deal with the particular issue which you have raised, absent a clear violation of the law.

Thank you for your continuing interest in railroad safety.

Sincerely,

/s/ Raymond K. James
RAYMOND K. JAMES
Chief Counsel

[August 4, 1988, letter to Lawrence M. Mann from Gregory McBride]

U.S. Department of Transportation

Federal Railroad Administration

[Aug. 4, 1988]

Lawrence M. Mann, Esq.
Alper & Mann
Suite 811
400 First St., N.W.
Washington, D.C. 20001

Dear Mr. Mann:

This is in response to your letters to Associate Administrator Joseph W. Walsh concerning FRA's interpretation of the Hours of Service Act as it applies to certain questions you have posed. I note at the outset that, like your questions, my responses are general in nature. Thus, this response should not be read as covering every factual variant that may arise. This letter does not concern the issue of duty calls to employees during off-duty periods. That issue is being addressed in a separate letter.

Remaining On A Train After Expiration Of Twelve Hours On Duty

Most of your questions concern how the Act applies to employees who are required by railroads to remain on a train after having been on duty for 12 continuous hours. Under the Act, the time of an employee engaged in train and engine service falls within one of three categories: (1) on-duty time is time between reporting for duty and final release from duty (except time spent deadheading from duty) and includes time spent actually providing service to the railroad, whether in covered service or in commingled service, and time spent deadheading to duty; (2) off-duty time is time actualiy available for rest, *i.e.*,

time coming after the final release from duty, including time spent commuting to and from the employee's regular reporting point; and (3) time spent deadheading from duty to the point of final release ("limbo time"), which as provided in section 1(b)(3) of the Act, is neither time on duty nor time off duty.

Generally, an employee required to remain on a train while awaiting deadhead transportation to a point of final release is neither on nor off duty; he or she is in a situation that most closely resembles, and is part and parcel of, deadheading from duty. However, if an employee is required to perform service of any kind during that period, he or she is on duty until all such service is completed. Thus, the question in each case is whether the employee was required or permitted to provide any actual service to the railroad during the time spent awaiting deadhead transportation.

We are aware of case law suggesting that employees are on duty while awaiting the arrival of a relief crew even if they perform no duties for the railroad during that period. *E.g., Missouri, K. and T. Ry.* v. *United States,* 231 U.S. 112 (1913); and *United States* v. *Pennsylvania R.R.,* 275 F.Supp. 345 (W.D. Pa. 1967). However, those cases are distinguishable on their facts and/or no longer good law in light of the 1969 amendments to the Act. In *Missouri,* the Supreme Court rejected the railroad's argument that the train crew was not on duty during a period in which the "engine was sent off for water and repairs." 231 U.S. at 119. The Court concluded that the employees were "none the less on duty when inactive. Their duty was to stand and wait." *Id.* Thus, the case involved a crew's waiting for an engine to be ready after reporting for duty, a situation that FRA would clearly consider to be time on duty. Although its language is broad, *Missouri* simply does not address the status of a crew that is not performing service while awaiting deadhead transportation. In fact, the year after *Missouri* was decided, an appellate court distinguished

crew members "released from any and every duty in connection with the movement of the [train], and retired to rest upon the train," from a fireman called upon to serve as an engine watchman; only the fireman was considered to have been on duty. *Great Northern Ry.* v. *United States,* 211 F. 309, 311 (9th Cir. 1914).

In *Pennsylvania,* a district court relied on *Missouri* in holding that crew members awaiting deadhead transportation were on duty despite the facts that the railroad had expressly relieved them of responsibility at the expiration of their maximum legal duty period and they had performed no subsequent duties. In addition to being an overly broad extension of *Missouri,* this case is simply no longer on point in light of the 1969 amendments to the Act. Those amendments added, *inter alia,* a definition (at section 1(b)(3)(C)) of "time on duty" that includes time spent deadheading to duty but excludes, from both time on duty and time off duty, time spent by an employee in deadhead transportation "from duty to his point of final release." Thus, for the first time, the Act itself recognized that an employee's time may fall between the on-duty and off-duty categories and that not all time between reporting for duty and the final release is time on duty. It is important to note that, as originally introduced, both bills from which these amendments arose (H.R. 8449 and S. 1938) would have counted all deadhead time (to or from duty) as time on duty. However, Congress recognized that, provided the employee is given the required 8 or 10 hours off duty after final release, there is no safety detriment caused by treating deadheading time as neither on nor off duty. Accordingly, because the premise of *Pennsylvania, i.e.,* that all time between reporting for duty and final release is time on duty, was removed by the 1969 amendments, that case no longer provides useful guidance as to the current requirements of the Act.

There is every reason to believe that Congress intended to include time spent awaiting deadhead transportation

to the point of final release as part of the deadheading itself. Identical logic supports considering the two periods (awaiting deadhead and deadheading itself) as limbo time. Neither period is truly available for rest, so it cannot be considered time off duty. Nor is either period one in which actual service (covered or commingled) is performed, so there is no safety rationale for considering it time on duty. Moreover, if either period were considered time on duty, the railroads would have no incentive to cease the performance of all duties at the conclusion of the maximum on-duty period. That is, if the railroad would be subject to the same penalty for tying up the crew as it would be if it required the crew to continue in service, one might expect some railroads to simply keep the train moving to the point of final release under the control of employees who had already worked for 12 hours. We believe it is far safer, and more consistent with the intent of Congress, to give the railroad the incentive to relieve the employees of all duties by considering both time awaiting deadhead transportation and time spent deadheading to the final release point as limbo time. That way, the railroad has not committed a safety violation, safety itself is not impaired, and the statutory off-duty period is not encroached upon by periods that are not avaliable for rest.

Performing Service While Awaiting Deadhead Transportation

The situation we have discussed above concerns employees in a status that some railroads describe as "relieved, but not released." There, employees are required to stay on their train to await transportation to the point of final release, but are expressly relieved of any duties. However, in some situations the railroad tells the crew to tie up but subsequently requires one or more members to perform service. Any employee required or permitted to perform such duties would, of course, be on duty until all such duties were completed.

The analysis is easy where the railroad's representative expressly states, when ordering the crew to tie up or thereafter, that certain duties must be performed. It is also easy to analyze the opposite situation, *i.e.*, where the railroad representative expressly relieves the crew of all duties and merely requires them to stay with their train until deadhead transportation arrives.

But difficult questions arise where the dispatcher or other railroad official in charge is not so explicit. If, for example, a dispatcher merely tells the crew members to put their train in a siding and does not tell them they are relieved from duty, and the railroad's operating rules impose general duties such as observing passing trains or protecting the train from vandalism, the employees may not be relieved from duty. These difficult cases will require an examination of the particular railroad's practice concerning how crews are relieved from duty. On one railroad the practice may be to simply tell the crew to tie up, which carries the message that the employees are—unless specifically ordered to perform a particular duty—completely relieved from duty and must merely await transportation. In fact, a railroad may have a standing policy that employees must relieve themselves from duty prior to exceeding their limit of duty hours, so that no specific order to that effect is necessary. On a different railroad, the practice may be that employees are not relieved from general duties such as observing passing trains unless an explicit order relieving them from duty is received.

Thus, sorting out these cases requires knowledge of specific facts from which FRA can determine whether the employees have been relieved of duties or not. If the order or message they receive is not explicit and the railroad has no standing instructions on how to construe an order to tie up the train, FRA may have to consult the railroad's rules to find out what duties the employees might reasonably have been expected to perform, in the absence of specific orders, while awaiting transportation.

Aside from the question of whether the railroad required or permitted certain service, there is the question of what constitutes service. You list the following possible duties in your letters of August 17 and August 26, 1988:

- protecting the train against vandalism
- observing passing trains for any defects or unsafe condition
- flagging
- shutting down locomotives or checking fluid levels
- communicating train consist information via radio
- being "responsible for handling any issue which might arise while the train is not moving"
- doing paperwork
- monitoring engine radios

The first five of these items clearly constitute duty if required or permitted by the railroad, but the last three beg the question of whether they actually and under all circumstances constitute duty. First, "being responsible for handling any issue which might arise" is vague. If the railroad had issued an order to that effect, that fact would probably be inconsistent with a conclusion that the railroad intended that the employee be relieved of all duties. If, however, the railroad had clearly relieved the employee but noted that he or she may be put back on duty should the need arise while awaiting the deadhead transportation, the employee would not be on duty again unless subsequently told to handle an issue that had arisen.

Second, "doing paperwork" when required or permitted to do so by the railroad is time on duty in commingled service. However, merely signing time returns, which ordinarily takes no more than a minute and occurs when

the crew has reached its lodging and is about to begin its rest, is so minimal that it should not be considered as time spent doing paperwork.

Third, "monitoring engine radios" when required or permitted by the railroad to do so is time on duty for an employee given that responsibility, but does not include use of the radio initiated by the train crew to attend to such incidental matters as calling a van driver to give the train's location or ascertain how long a wait the crew will have before being picked up. Nor would an employee who chose to listen to radio transmissions after having been relieved of any responsibility to do so be considered as on duty.

I might also note that, in addition to having to determine whether an activity constituted service and was required or permitted by the railroad, FRA must also weigh the likely compliance impact and litigation risks in deciding whether to assess penalties.

You point out that there have been unspecified situations in which time spent awaiting deadhead transportation has been counted toward the required off-duty period. Time off duty begins at the point of final release, not while the employees are sitting on their train. FRA has permitted one very limited exception as a practical matter: if the time between being relieved of duty and arriving at an away-from-home lodging is 30 minutes or less, such a period can be included in time off duty. Our rationale is that, just as time off duty at a home terminal includes commuting time, so time off duty at an away-from-home terminal may include a reasonable allowance (30 minutes) for commuting. However, if the crew is not at the lodging within 30 minutes of being relieved from duty, the allowance is lost and the whole period (awaiting deadhead and being deadheaded) is limbo time. This policy gives the railroads the incentive to get the employees off the train and to the lodging quickly, which seems to be a purpose you share.

You also claim that crews have been required to stay on their trains as long as 9 hours awaiting transportation. As long as no duties are performed and the full off-duty period is given once the crew arrives at the lodging, these situations are not violations of the Act. Nevertheless, except in the most extreme emergency, such situations are outrageous. I can only point out that, if FRA had substantive regulatory authority in the hours of service area, a regulation could be written to address that issue. For example, a rational rule might extend the required off-duty period by an hour for any hour spent awaiting transportation. Such a rule would discourage the practice that concerns you and possibly increase safety. However, the rigidity of the Act precludes our even considering such a rule.

Very truly yours,

/s/ Gregory B. McBride
GREGORY B. MCBRIDE
Assistant Chief Counsel
for Safety

[October 28, 1992, letter to Robert W. Blanchette from S. Mark Lindsey]

U.S. Department
of Transportation

Federal Railroad
Administration

[Oct. 28, 1992]

Robert W. Blanchette
Vice President-Law and General Counsel
Association of American Railroads
American Railroads Building
50 F St., N.W.
Washington, D.C. 20001

Dear Mr. Blanchette:

On September 22, 1992, the United States Court of Appeals for the Ninth Circuit issued a decision in the related cases of *United Transp. Union v. Skinner* (No. 90-16741) ("*UTU*") and *Bhd. of Locomotive Engineers v. Skinner* (Nos. 91-35911, 91-36061) ("*BLE*"). A copy of the decision is enclosed. Those cases concern FRA's interpretation of the Hours of Service Act as it pertains to the status of train crew members waiting for deadhead transportation to their point of final release.

The Court of Appeals upheld the decision of the district court in Portland in *BLE*, which found that all time spent waiting for transportation is to be considered on-duty time. In the *UTU* case, which was an appeal from the district court in San Francisco, the Court of Appeals affirmed the district court's order of dismissal as to the claims for injunctive relief and mandamus, but reversed the district court's dismissal of the entire case and remanded the case to that court for further proceedings con-

sistent with the appellate court's opinion on the interpretive issue.

FRA has traditionally considered an employee on duty during the time spent awaiting arrival of the deadhead vehicle only if the employee actually has duties to perform. If the railroad had relieved the employee of all responsibility, we have considered the time spent merely waiting for the deadhead vehicle to arrive as "limbo time" (*i.e.*, neither on nor off duty) for hours of service purposes.

Although we do not agree with the court's rationale, we have decided to accept its decision and treat it as binding. Given the ambiguity of the Act's pertinent provisions, the issue has always been a close one. While we do not agree that the conclusion reached by the court is compelled by previous case law, we believe the court's reading of the statute, like the interpretation FRA has held until now, to be reasonable.

Moreover, our traditional interpretation was based on the assumption that some railroads might choose to continue crews in train operation if having the crews tie up the train and await deadhead transportation would itself constitute a violation. We did not wish to encourage the less safe alternative of having the crews continue train operation after expiration of their legally permissible hours. However, we have not seen evidence of such behavior in Oregon, where the interpretation of the district court has been in effect for more than a year. Moreover, with increased Hours of Service Act penalties and individual liability now a reality, we are more convinced that railroads will work to avoid violations and, if faced with an inevitable violation, choose the safer alternative. Although awaiting deadhead transportation will now constitute time on duty and FRA will enforce the Act accordingly, FRA will treat more harshly the violations that are more likely to have a serious impact on safety, *i.e.*, those

violations involving actual train operation after the period permitted by the Act. In addition to the legal incentives to encourage compliance, it appears that railroads have an economic incentive to minimize time spent awaiting deadhead transportation, which is wholly unproductive time.

As our original interpretation made clear, we have long been concerned about the instances in which employees are held on trains for several hours awaiting deadhead transportation even in the absence of any valid emergency that might explain such an occurrence. To the extent the waiting periods are extremely lengthy, there is a chance that they could contribute to the cumulative exhaustion of the employee, despite the fact that the legally required rest period is provided upon arrival at the point of final release. Thus, to the extent that application of the Ninth Circuit's decision reduces the frequency of such instances, it may actually contribute to safety.

Accordingly, in the interest of uniform application of the Hours of Service Act, we will treat the Ninth Circuit's opinion as binding in the entire nation. We will do so in two stages. We will consider the court's reading of the Act binding within the Ninth Circuit beginning at 12:01 a.m. on November 1, 1992. The Ninth Circuit, of course, includes Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington. We have chosen November 1 because that date will likely precede or be very close to the issuance of the mandate by the Court of Appeals and railroads within that circuit have had every reason to expect that its mandate would be honored.

This means that, *starting on November 1*, all time spent awaiting the arrival of a deadhead vehicle for transportation to the point of final release shall, *if it occurs within the territory of the Ninth Circuit*, be treated as time on duty, and such time should be recorded as such and reports of excess service filed, as necessary, under 49 CFR

Part 228. Should violations occur and come to FRA's knowledge, FRA will, of course, continue to exercise its prosecutorial discretion in deciding which cases warrant civil penalties. Although we plan to mail copies of this letter to affected railroads that operate within the Ninth Circuit, we would appreciate your cooperation in making known our intention to enforce the court's decision to your member railroads.

For the remainder of the nation, we believe that a period of adjustment is necessary in order to permit railroads to train their employees who will be responsible for implementation of the decision. Railroads with operations outside the Ninth Circuit have not had reason, until now, to believe those operations would be affected by the court's decision. We believe a period of 60 days should permit the necessary training to occur. Accordingly, we will begin to apply the Ninth Circuit's decision to operations outside that circuit at 12:01 a.m. on January 1, 1993.

We believe that the longstanding controversy surrounding this single issue of how to treat time spent awaiting deadhead transportation is illustrative of problems inherent in the Hours of Service Act itself. We remain hopeful that railroad management and railroad labor organizations will join FRA and the National Transportation Safety Board in recommending changes in the Act that would permit FRA to issue hours of service regulations reflective of current scientific information concerning sleep cycles and the effects of fatigue on safety-sensitive performance.

Sincerely,

/s/ S. Mark Lindsey
S. MARK LINDSEY
Chief Counsel

cc: Lawrence M. Mann, Esq.
Thomas C. Dorsey, Esq.
American Short Line Railroad Assn.

All railroads with operations in the Ninth Circuit

MEMORANDUM

U.S. Department
of Transportation

Federal Railroad
Administration

Date: Dec. 2, 1992 Reply to Attn of OP 92-05

Subject: Hypothetical Examples for the "On-Duty Time" decision of the United States Court of Appeals for the Ninth Circuit

/s/ Edward R. English
From: EDWARD R. ENGLISH
Director, Office of Safety Enforcement

To: Regional Directors

Reference OP Bulletin 92-04 relative to the recent decision of the United States Court of Appeals for the Ninth Circuit in *United Transportation Union* v. *Skinner* (No. 90-16741) and *Brotherhood of Locomotive Engineers* v. *Skinner* (Nos 91-35911, 91-36061) concerning time spent waiting for deadhead transportation to the point of final release after the expiration of the mandatory limits imposed by the Hours of Service Act (Act). In its decision, the court held that all time waiting for transportation was covered service. The attached examples are provided as guidance in determining "on-duty time" as a result of train and engine crews waiting for transportation to their point of final release.

GENERAL STATEMENT

COVERED TIME: WAITING FOR TRANSPORTATION

Crew member(s) reach their statutory limits (expire) under the Act at an outlying point and remain

on or near the train until transportation arrives to carry them to their point of final release. *ONLY* the waiting time is covered service. Waiting time ends when the expired crew ceases to be *THE CREW OF THE TRAIN*, which occurs when the transportation that will carry them back to their point of final release arrives.

HYPOTHETICAL EXAMPLES OF "ON-DUTY" TIME COVERED BY THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DECISION

The following are examples of time that will be counted as covered service when the decision is applied in your region of the United States.

Example A:

Brazos and Santo Southern (BSS) Train XYZ is called for 2:30 a.m. at Fort Worth for a run to Ranger. The crew expires under the Hours of Service Law at Santo at 2:30 p.m. and remains on the train. Transportation (either contract van, taxi or company auto) arrives at Santo at 3:55 p.m. The crew is transported to Ranger where they arrive at 5:05 p.m. and tie-up at 5:15 p.m.

Violation: 2:30 p.m. to 3:55 p.m. (actual waiting time)

Limbo Time: 3:55 to 5:15 p.m. (travel and tie-up)

Example B:

Same scenario as Example A except at 2:25 p.m. the BSS Dispatcher instructs the crew to relieve themselves prior to the expiration of their hours of service (2:30 p.m.), vacate the train, walk up town to Miss Maude's Cafe where transportation will pick them up for their deadhead to Ranger. Transporta-

tion arrives at 3:55 p.m. The crew is transported to Ranger where they arrive at 5:05 p.m. and tie-up at 5:15 p.m.

Violation: 2:30 p.m. to 3:55 p.m. The fact that the crew is not physically present on the train is not the determining factor. Waiting time is the determinate. The crew had to wait until 3:55 p.m. to be picked up by their transportation.

Limbo Time: 3:55 p.m. to 5:15 p.m. (travel and tie-up)

Example C:

Same scenario as Example A except a relief crew is deadheaded on following train DEF. Train DEF arrives at Santo at 3:50 p.m. with the relief crew. The relief crew assumed operation of Train XYZ at 3:55 p.m. Train DEF departs Santo at 4:00 p.m. with the expired crew and arrives Ranger at 5:05 p.m. Expired crew ties-up at 5:15 p.m.

Violation: 2:30 p.m. to 3:55 p.m. The expired crew remained "the crew of the train" until they were relieved by the deadhead relief crew.

Limbo Time: 3:55 p.m. to 5:15 p.m. (travel and tie-up)

Example D:

Same scenario as Example C except the expired crew remained on Train XYZ for their deadhead trip to Ranger. Train XYZ departed Santo at 4:30 p.m. *behind* Train DEF. Train XYZ arrived at Ranger at 5:45 p.m. Expired crew ties-up at 5:55 p.m.

Violation: 2:30 p.m. to 3:55 p.m. Expired crew was relieved at 3:55 p.m. They are no longer "the crew of the train." They are considered as being

in their mode of transportation at that time, provided they are deadheading on Train XYZ.

Limbo Time: 3:55 p.m. to 5:55 p.m. (travel and tie-up)

Example E:

Same scenario as Example A except a lite engine consist (or Train DEF) arrives at Santo at 3:50 p.m. Lite engine consist (or Train DEF) couples into (or picks-up) Train XYZ at 3:55 p.m. for the purpose of towing Train XYZ to Ranger. Combined Train departs Santo at 4:30 p.m. and arrives Ranger at 5:45 p.m. Expired crew ties-up at 5:55 p.m.

Violation: 2:30 p.m. to 3:55 p.m. The expired crew is relieved at 3:55 p.m. when they no longer are "the crew of the train."

Limbo Time: 3:55 p.m. to 5:55 p.m. (travel and tie-up)

Example F:

Same scenario as Example A except the BSS Dispatcher has decided to tie-up the crew at Santo. The BSS Dispatcher has called a local Santo taxi to meet the train. The crew is off Train XYZ and into the taxi at 2:30 p.m., The taxi arrives at Santo Sleepeze Motel at 2:45 p.m. The crew makes a brief mark-off call to the BSS Crew Dispatcher at 2:55 p.m. and ties-up for ten (10) hours rest. The crew is called on their rest for a return deadhead to Fort Worth at 12:55 a.m.

Violation: Predicated on whether or not Santo is a "designated terminal." The crew ceased to be the crew of the train when they were removed for purposes of tieing up for rest. If Santo is not a "desig-

nated terminal", the crew would be on continuous duty until they arrived back at Fort Worth. If Santo is a "designated terminal", a violation would not have occurred since the crew ceased to be "the crew of the train" at 2:30 p.m.

Limbo Time: 2:30 p.m. to 2:55 p.m. (travel and tie-up)

Example G:

BSS Train XYZ arrives at the entry switch to the east end of Ranger Yard at 2:30 p.m. The Ranger Yardmaster instructs the crew to leave the train and wait on an adjacent service road for transportation (contract van, taxi, or company auto). A waiting yard job couples into Trail XYZ, yards the train and takes XYZ's units to the locomotive facility. Crew transportation is delayed. It arrives at the east end of Ranger Yard at 3:05 p.m. The crew arrives at the tie-up point at 3:35 and ties-up at 3:40 p.m.

Violation: 2:30 p.m. to 3:05 p.m. (actual waiting time)

Limbo Time: 3:05 to 3:40 p.m. (travel and tie-up)

Example H:

Same scenario as Example G except the Ranger Yardmaster instructs the crew to remain on the train for transportation because other sources of transportation are not available. The yard job couples into Train XYZ at 2:30 p.m. The train is "yarded" at 3:00 p.m. The yard crew removes Train XYZ's locomotive power and delivers it to the locomotive facility at 3:15 p.m. The tie-up point for the crew of Train XYZ is near the locomotive facility. The crew walks to the tie up point and ties up at 3.30 p.m.

Violation: None. The tow-in of Train XYZ became the crews transportation to their point of final release. In addition, when Train XYZ came under tow, the expired crew was no longer the crew of the train. While this event may be construed as a 5 minute violation (2:30 to 2:35 p.m.), the transportation for the crew (yard job) was present at 2:30 p.m. The *de minimis* nature of the event should also be considered in this example.

Limbo Time: 2:30 p.m. to 3:30 p.m. (travel and tie-up)

Example I:

BSS Yard Job OHME-2 is assigned to work 3:30 p.m. to 11:30 p.m. primarily to make interchange to foreign lines in the Ranger area. OHME-2 departs Ranger Yard at 10:00 p.m. with daily interchange for the Denton, Abilene and Northern (DAN). Due to congestion OHME-2 is still in the DAN Yard at 3:30 a.m. A taxi carrying the relief crew arrives at 4:15 a.m. The expired crew departs the DAN Yard in the taxi at 4:20 a.m., arrives Ranger Yard crew room at 5:10 a.m., and ties-up at 5:15 a.m.

Violation: 3:30 a.m. to 4:15 a.m. (actual waiting time)

Limbo Time: 4:15 a.m. to 5:15 a.m. (travel and tie-up)

NOTE: If the OHME-2 crew is scheduled to work the next afternoon and circumstances caused the tie-up time to be 5:31 a.m. or later, the start time of the next afternoon would have to be set back to obey the requirement that the crew have *ten consecutive hours off duty*.

While these examples do not cover all possible hypothetical situations, two events should be considered in determining the existence of a violation relative to the Ninth Circuit's decision.

1. The time transportation *arrived*.
2. The time the expired crew ceased to be *the crew of the train*.

MEMORANDUM

U.S. Department
of Transportation

Federal Railroad
Administration

RECEIVED BY FAX AT CONRAIL SYSTEM OPERATING RULES OFFICE—JANUARY 11, 1993

FRA INTERPRETATIONS OF "CREW AWAITING DEADHEAD TRANSPORTATION" AND VIOLATION OF THE HOURS OF SERVICE ACT

(Based on Ninth Circuit Court Decision)

Reference to the recent decision of the United States Court of Appeals for the Ninth Circuit in *United Transportation Union* v. *Skinner* (No. 90-16741) and *Brotherhood of Locomotive Engineers* v. *Skinner* (Nos. 91-35911, 91-36061) concerning time spent waiting for deadhead transportation to the point of final release after the expiration of the mandatory limits imposed by the Hours of Service Act (Act). In its decision, the court held that all time waiting for transportation was covered service. The attached examples are provided as guidance in determining "on-duty time" as a result of train and engine crews waiting for transportation to their point of final release.

GENERAL STATEMENT

COVERED TIME: WAITING FOR TRANSPORTATION

Crew member(s) reach their statutory limits (expire) under the Act at an outlying point and remain on or near the train until transportation arrives to carry them to their point of final release. *ONLY*

the waiting time is covered service. Waiting time ends when the expired crew ceases to be *THE CREW OF THE TRAIN*, which occurs when the transportation that will carry them back to their point of final release arrives.

HYPOTHETICAL EXAMPLES OF "ON-DUTY" TIME COVERED BY THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DECISION

The following are examples of time that will be counted as covered service when the decision is applied in your region of the United States.

Example A:

Brazos and Santo Southern (BSS) Train XYZ is called for 2:30 a.m. at Fort Worth for a run to Ranger. The crew expires under the Hours of Service Law at Santo at 2:30 p.m. and remains on the train. Transportation (either contract van, taxi or company auto) arrives at Santo at 3:55 p.m. The crew is transported to Ranger where they arrive at 5:05 p.m. and tie-up at 5:15 p.m.

Violation: 2:30 p.m. to 3:55 p.m. (actual waiting time)

Limbo Time: 3:55 p.m. to 5:15 p.m. (travel and tie-up)

Example B:

Same scenario as Example A except at 2:25 p.m. the BSS Dispatcher instructs the crew to relieve themselves prior to the expiration of their hours of service (2:30 p.m.), vacate the train, walk up town to Miss Maude's Cafe where transportation will pick

them up for their deadhead to Ranger. Transportation arrives at 3:55 p.m. The crew is transported to Ranger where they arrive at 5:05 p.m. and tie-up at 5:15 p.m.

Violation: 2:30 p.m. to 3:55 p.m. The fact that the crew is not physically present on the train is not the determining factor. Waiting time is the determinate. The crew had to wait until 3:55 p.m. to be picked up by their transportation.

Limbo Time: 3:55 p.m. to 5:15 p.m. (travel and tie-up)

Example C:

Same scenario as Example A except a relief crew is deadheaded on following train DEF. Train DEF arrives at Santo at 3:50 p.m. with the relief crew. The relief crew assumed operation of Train XYZ at 3:55 p.m. Train DEF departs Santo at 4:00 p.m. with the expired crew and arrives Ranger at 5:05 p.m. Expired crew ties-up at 5:15 p.m.

Violation: 2:30 p.m. to 3:55 p.m. The expired crew remained "the crew of the train" until they were relieved by the deadhead relief crew.

Limbo Time: 3:55 p.m. to 5:15 p.m. (travel and tie-up)

Example D:

Same scenario as Example C except the expired crew remained on Train XYZ for their deadhead trip to Ranger. Train XYZ departed Santo at 4:30 p.m. *behind* Train DEF. Train XYZ arrived at Ranger at 5:45 p.m. Expired crew ties-up at 5:55 p.m.

Violation: 2:30 p.m. to 3:55 p.m. Expired crew was relieved at 3:55 p.m. They are no longer "the crew of the train." They are considered as being

in their mode of transportation at that time, provided they are deadheading on Train XYZ.

Limbo Time: 3:55 p.m. to 5:55 p.m. (travel and tie-up)

Example E:

Same scenario as Example A except a lite engine consist (or train DEF) arrives at Santo at 3:50 p.m. Lite engine consist (or Train DEF) couples into (or picks-up) Train XYZ at 3:55 p.m. for the purpose of towing Train XYZ to Ranger. Combined Train departs Santo at 4:30 p.m. and arrives Ranger at 5:45 p.m. Expired crew ties-up at 5:55 p.m.

Violation: 2:30 p.m. to 3:55 p.m. The expired crew is relieved at 3:55 p.m. when they no longer are "the crew of the train."

Limbo Time: 3:55 p.m. to 5:55 p.m. (travel and tie-up)

Example F:

Same scenario as Example A except the BSS Dispatcher has decided to tie-up the crew at Santo. The BSS Dispatcher has called a local Santo taxi to meet the train. The crew is off Train XYZ and into the taxi at 2:30 p.m. The taxi arrives at Santo Sleepeze Motel at 2:45 p.m. The crew makes a brief mark-off call to the BSS Crew Dispatcher at 2:55 p.m. and ties-up for ten (10) hours rest. The crew is called on their rest for a return deadhead to Fort Worth at 12:55 a.m.

Violation: Predicated on whether or not Santo is a "desigated terminal." The crew ceased to be the crew of the train when they were removed for purposes of tieing up for rest. If Santo is not a "designated terminal", the crew would be on continuous

duty until they arrived back at Fort Worth. If Santo is a "designated terminal", a violation would not have occurred since the crew ceased to be "the crew of the train" at 2:30 p.m.

Limbo Time: 2:30 p.m. to 2:55 p.m. (travel and tie-up)

Example G:

BSS Train XYZ arrives at the entry switch to the east end of Ranger Yard at 2:30 p.m. The Ranger Yardmaster instructs the crew to leave the train and wait on an adjacent service road for transportation (contract van, taxi, or company auto). A waiting yard job couples into Train XYZ, yards the train and takes XYZ's units to the locomotive facility. Crew transportation is delayed. It arrives at the east end of Ranger Yard at 3:05 p.m. The crew arrives at the tie-up point at 3:35 and ties-up at 3:40 p.m.

Violation: 2:30 p.m. to 3:05 p.m. (actual waiting time)

Limbo Time: 3:05 p.m. to 3:40 p.m. (travel and tie-up)

Example H:

Same scenario as Example G except the Ranger Yardmaster instructs the crew to remain on the train for transportation because other sources of transportation are not available. The yard job couples into Train XYZ at 2:35 p.m. The train is "yarded" at 3:00 p.m. The yard crew removes Train XYZ's locomotive power and delivers it to the locomotive facility at 3:15 p.m. The tie-up point for the crew of Train XYZ is near the locomotive facility. The crew walks to the tie up point and ties up at 3:30 p.m.

Violation: None. The tow-in of Train XYZ became the crews transportation to their point of final release. In addition, when Train XYZ came under tow, the expired crew was no longer the crew of the train. While this event may be construed as a 5 minute violation (2:30 to 2:35 p.m.), the transportation for the crew (yard job) was present at 2:30 p.m. The *de minimis* nature of the event should also be considered in this example.

Limbo Time: 2:30 p.m. to 3:30 p.m. (travel and tie-up)

Example I:

BSS Yard Job OHME-2 is assigned to work 3:30 p.m. to 11:30 p.m. primarily to make interchange to foreign lines in the Ranger area. OHME-2 departs Ranger Yard at 10:00 p.m. with daily interchange for the Denton, Abliene and Northern (DAN). Due to the congestion OHME-2 is still in the DAN Yard at 3:30 a.m. A taxi carrying the relief crew arrives at 4:15 a.m. The expired crew departs the DAN Yard in the taxi at 4:20 a.m., arrives Ranger Yard crew room at 5:10 a.m., and ties-up at 5:15 a.m.

Violation: 3:30 a.m. to 4:15 a.m. (actual waiting time)

Limbo Time: 4:16 a.m. to 5:15 a.m. (travel and tie-up)

NOTE: If the OHME-2 crew is scheduled to work the next afternoon and circumstances caused the tie-up time to be 5:31 a.m. or later, the start time of the next afternoon would have to be set back to obey the requirement that the crew have *two consecutive hours off duty.*

While these examples do not cover all possible hypothetical situations, two events shoud be considered in determining the existence of a violation relative to the Ninth Circuit's decision.

1. The time transportation *arrived.*
2. The time the expired crew ceased to be *the crew of the train.*

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 93-1505

THE ATCHISON, TOPEKA, AND SANTA FE
RAILWAY COMPANY
1700 East Golf Road
Schaumburg, Illinois 60173,

BURLINGTON NORTHERN RAILROAD COMPANY
3800 Continental Plaza
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Forth Worth, Texas 76102,

CONSOLIDATED RAIL CORPORATION
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2001 Market Square
Philadelphia, Pennsylvania 19101,

CSX TRANSPORTATION, INC.
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Jacksonville, Florida 32202,

ILLINOIS CENTRAL RAILROAD COMPANY
455 North Cityfront Plaza Drive
Chicago, Illinois 60611,

NORFOLK SOUTHERN RAILWAY COMPANY
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Norfolk, Virginia 23510,

NORFOLK AND WESTERN RAILWAY COMPANY
Three Commercial Place
Norfolk, Virginia 23510,

SOUTHERN PACIFIC TRANSPORTATION COMPANY
One Market Plaza
San Francisco, California 94105,

and

UNION PACIFIC RAILROAD COMPANY
1416 Dodge Street
Omaha, Nebraska 68179,
Petitioners,

v.

FEDERICO PENA
Secretary of Transportation
400 Seventh Street, S.W.
Washington, D.C. 20590,

DEPARTMENT OF TRANSPORTATION
400 Seventh Street, S.W.
Washington, D.C. 20590,

S. MARK LINDSEY
Acting Administrator
Federal Railroad Administration
400 Seventh Street, S.W.
Washington, D.C. 20590,

and

FEDERAL RAILROAD ADMINISTRATION
400 Seventh Street, S.W.
Washington, D.C. 20590,
Respondents.

**PETITION FOR REVIEW OF AGENCY ACTION
BY THE FEDERAL RAILROAD ADMINISTRATION**

Pursuant to 28 U.S.C. § 2342(7), Petitioners The Atchison, Topeka, and Santa Fe Railway Company ("Santa Fe"), Burlington Northern Railroad Company ("BN"), Consolidated Rail Corporation ("Conrail"), CSX Transportation, Inc. ("CSXT"), Illinois Central Railroad Company ("IC"), Norfolk Southern Railway Company ("NS"), Norfolk and Western Railway Company ("NW"), Southern Pacific Transportation Company ("SP"), and Union Pacific Railroad Company ("UP") (hereinafter "Railroads") Petition for Review of the Respondents'

erroneous interpretation and application of the Hours of Service Act ("HSA"), 45 U.S.C. §§ 61-66.[1]

Since the HSA was enacted in 1907, the time spent waiting by a train crew for transportation, after being relieved from any further train operating duties, was never considered "on duty" time for purposes of calculating the maximum period that a train crew can be on duty under the HSA. Such time was considered off duty time at least until the 1969 amendments to the HSA. After the 1969 amendments, Respondent Federal Railroad Administration ("FRA") considered such time to be "limbo time," *i.e.*, neither on duty nor off duty time. FRA now seeks to reinterpret the HSA and reclassify this waiting time as on duty time, based on the United States Court of Appeals for the Ninth Circuit's decision in *United Transportation Union v. Skinner*, 975 F.2d 1421 (9th Cir. 1992).

Despite the fact that both the Railroads and FRA disagree with the Ninth Circuit's interpretation of the HSA, FRA, which was under no legal compulsion to do so, extended the Ninth Circuit interpretation to all railroads nationwide on January 1, 1993. FRA's new interpretation was most recently reflected and expanded in agency memoranda furnished to certain railroads. *See* App. A. FRA considers the memoranda as its official agency position. The FRA's new interpretation is contrary to the statutory language and 85-plus year history of the HSA.

FRA's actions in including the time spent waiting by a train crew that has been relieved from further operating duties as on duty time under the HSA and extending its new, erroneous interpretation of the HSA nationwide are arbitrary, capricious, and not in accordance with the law

[1] On September 3, 1992, Congress amended the Federal Railroad Safety Act, 45 U.S.C. § 431(f), to provide that appeals of final agency action under HSA are subject to the Hobbs Act. *See* Pub. L. No. 102-365, § 2, 106 Stat. 972 (Sept. 3, 1992).

and contrary to the HSA. In addition, the HSA's actions violate the Administrative Procedure Act, because the agency engaged in rulemaking without providing the public with notice of the proposed rule and an opportunity for interested parties to comment on the proposed rule.

The Railroads request that this Court order the FRA to rescind nationwide application of its new interpretation of HSA, provide notice to the public of its new interpretation, and provide interested parties with an opportunity to comment. In the alternative, the Railroads ask this Court to interpret the HSA to provide that time spent waiting by a train crew which has been relieved from further operating duties is not on duty time under the HSA. Such an interpretation is required by the statute and the legislative history.

Venue is proper in this Court pursuant to 28 U.S.C. § 2343, because Petitioner IC's principal office is located in Chicago, Illinois.

Respectfully submitted,

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/s/ Ronald M. Johnson
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Attorneys for Petitioners

Date: March 2, 1993

[Memorandum Dated January 11, 1993 and
Certificate of Service Omitted in Printing]

BEFORE THE
FEDERAL RAILROAD ADMINISTRATION

AFFIDAVIT OF D. C. EUBANK

I, D. C. EUBANK, based on my personal knowledge, do affirm and state as follows:

1. My name is D. C. Eubank. I am Assistant Vice President-Operating Practices for CSX Transportation, Inc. ("CSXT"). I have held this position since September 1, 1991. My duties include responsibility for CSXT's operating rules, engineer training and certification, hazardous materials field response, FRA alcohol and drug testing, and derailment prevention. I am thoroughly familiar with the historical application of the Hours of Service Act by the Federal Railroad Administration ("FRA") or its predecessors, and with the operational problems that are created by the FRA's recent determination that it will consider "waiting time" as on-duty time rather than "limbo time."

2. I began my railroad career as a brakeman with one of CSXT's predecessors, The Chesapeake and Ohio Railway Company ("C&O") in November of 1955. I worked for the C&O in a contract (union-represented) position until October of 1959, when I was drafted into the Army. I returned to work for the C&O as a conductor in January of 1962, and remained in that position until September of 1964, when I was promoted to a non-contract (management) position as transportation technician in Huntington, West Virginia. From that time up to the present I have held a succession of non-contract positions in the operating department of CSXT or one of its predecessors, including the position of assistant trainmaster, terminal trainmaster, terminal manager, division superintendent, director-operations planning, and general superintendent-line operations. Based upon this experience, I am thor-

oughly familiar with CSXT's and its precedessors' practices regarding waiting time and the Hours of Service Act since 1955, as well as with federal regulatory practices regarding this subject.

3. CSXT is one of the major providers of rail transportation services in the eastern United States, providing rail transportation services to 20 states, the District of Columbia, and the Province of Ontario, Canada. CSXT's rail system consists of approximately 18,800 route miles; it averages approximately 1,300 trains, and 15,000 carloads per day.

4. When I began work for the C&O as a brakeman in 1955, the Hours of Service Act allowed, and the C&O did as necessary, work a train crew right up to the 16 hour maximum that was then applicable under the Hours of Service Act. Any time spent by the train crew beyond this 16 hour period waiting for the arrival of transportation, or being transported back to a terminal where the crew's tour of duty would end, was considered off-duty time under the Hours of Service Act.

5. At no time prior to 1969 did any of CSXT's labor organizations or employees ever to my knowledge allege that this practice violated the Hours of Service Act. At no time prior to 1969 did any federal agency or official ever to my knowledge claim or advise the C&O or its affiliated railroads that this practice violated the Hours of Service Act. Federal inspectors during this period regularly visited the railroad's property and were familiar with its operating practices, including the practice of considering "waiting time" for deadhead transportation as off-duty time.

6. There was to my knowledge no change in the practice of the C&O or its affiliated railroads, or in the federal government's enforcement policy, in 1967 or thereafter with respect to waiting time as a result of the decision in *United States v. Pennsylvania Railroad*, 275 F.Supp. 345 (W.D.Pa. 1967).

7. Subsequent to the Hours of Service Act amendments in 1969, CSXT and its predecessor railroads affiliated as part of the Chessie System did not consider waiting time to be time on duty under the Hours of Service Act. The 1969 amendment reclassified deadhead transportation to a duty assignment as on-duty time. It also created a new category, neither on-duty nor off-duty time, for deadhead transportation from a duty assignment to point of final release. This category of time became known as "limbo time." CSXT and its precedessor railroads considered waiting time to be part of this "limbo time."

8. During the administration of the Hours of Service Act ("HSA") between 1969 and 1992, the FRA did not to my knowledge consider waiting time to be on-duty time. To my knowledge, prior to 1992 the FRA took no exception to CSXT's or its predecessors' practice of treating waiting time as part of limbo time.

9. FRA's announced interpretation whereby, effective January 1, 1993, it will now consider waiting time to be on-duty time creates significant operational problems and inefficiencies for CSXT with no attendant safety benefits. Previously, where a train crew would complete 12 hours of service while still in transit, CSXT was required only to identify a point of rest enroute where the crew could tie up the train prior to expiration of its 12 hours. Under the new interpretation, CSXT must attempt to stop the train sufficiently in advance of 12 hours to permit deadhead transportation or a relief crew to be notified and to meet the crew at a tie-up point before the 12 hours have expired. This requires the company to reduce the time in which the train crew can actually operate the train below the 12-hours period authorized by statute. In fact, CSXT previously required a train crew enroute to notify the train dispatcher when ten hours of their on-duty time had expired, in order to permit planning in the event the crew would be unable to reach its destination. Effective January 1, 1993 as a result of FRA's new interpretation re-

garding waiting time, this notice period has been advanced to nine hours because trains will now have to be stopped sooner and deadhead transportation or relief crews must be contacted sooner.

10. Unanticipated delays in train operations inevitably result in train crews being unable to reach their destinations within their 12-hour time limit, despite the fact that CSXT's operations are scheduled to permit compliance with the Hours of Service Act. Under the new interpretation, CSTX must estimate to the best of its ability the time it will take to arrange for deadhead transportation or a relief crew to meet the train at a point where it can be stopped. Not only will the train have to be stopped earlier than usual, but the railroad cannot absolutely predict or control the time that deadhead transportation or a relief crew will require to meet the train. Delays can result from a variety of factors, including deadhead transportation or a relief crew not being immediately available, encountering delays or breakdowns enroute, train delays, and communication mix-ups among the numerous parties who must coordinate this operation. Due to these logistical problems, the railroad inevitably will be exposed to fines when the deadhead transportation or relief crew does not arrive in time, despite the best efforts of all concerned.

11. The fines the railroad will be subjected to, and the reduction in crew productivity that will occur as the railroad attempts to comply with FRA's new interpretation, does not advance the underlying safety goals of the HSA. Once a train is stopped at the 12-hour limit, its crew is relieved of all train-handling responsibility. Accordingly, there is no safety risk to either the public or the train crew associated with the historical practice of considering this waiting time as off-duty time or, subsequently, as limbo time. Indeed, once the train crew is relieved from duty, neither CSXT nor its predecessors even required the crew to remain on the train. The crew is and has always been free to await deadhead transportation in a restaurant or other facility if available, or to make its own way to the point of final release rather than await deadhead transportation provided by the company. Furthermore, CSTX train crews normally do not have to await deadhead transportation for an extended period of time beyond their 12-hour limit.

Further affiant sayeth naught.

/s/ D. C. Eubank
D. C. EUBANK

[Notarization Omitted in Printing]

BEFORE THE
FEDERAL RAILROAD ADMINISTRATION

AFFIDAVIT OF ARTHUR HENSON

STATE OF COLORADO)
CITY AND) ss.
COUNTY OF DENVER)

I, Arthur Henson, being first duly sworn, depose and say as follows:

1. I was first employed by a corporate predecessor of Southern Pacific Transportation Company ("SPT") as a telegraph operator in 1946. In 1950 I was promoted to Train Dispatcher and held that position until 1959 when I was appointed to the position of Assistant Train Master. From 1959 until 1975 I held various officer positions in the Transportation Department of SPT. In 1975 I was appointed Senior Chief Dispatcher at Houston.

2. From 1977 through the present I have held the following positions: Manager of the Power Bureau, Assistant to the General Manager, Assistant Superintendent, Superintendent, Assistant General Manager, General Manager and Vice President-Transportation.

3. During my entire career as an officer of SPT I have been responsible for seeing that SPT complies with the Hours of Service Act within the geographical territory under my jurisdiction in the particular job that I held. I am thoroughly familiar with the practices and policies of SPT with respect to the Hours of Service Act.

4. When I became a dispatcher in 1950 it was the railroad's practice not to count the time spent by train crews waiting to be picked up for rest as "on duty" time

under the Hours of Service Act. Once a train crew had been instructed to stop their train and await transportation to their off duty point they were considered to be no longer on duty. They were considered to be "off duty".

5. After the 1969 amendments to the Hours of Service Act the Federal Railroad Administration took the position that such waiting time was neither "on duty" or "off duty" time but would be considered as "limbo" time. That became the position of SPT at that time.

6. From 1950 until the Ninth Circuit Decision in *United Transportation Union v. Skinner*, 1992 U.S. App. Lexis 22851 (9th Cir. September 22, 1992), it was SPT's practice not to count such waiting time as on duty time. Such waiting time was never reported as "on duty" time under the Hours of Service Act. At no time did any representative of the Federal Railroad Administration or its predecessor advise SPT that such waiting time should be considered as "on duty" time under the Hours of Service Act.

/s/ Arthur Henson
ARTHUR HENSON

[Notarization Omitted in Printing]

BEFORE THE
FEDERAL RAILROAD ADMINISTRATION

AFFIDAVIT OF ALLAN C. FISHER

I, ALLAN C. FISHER, based on my personal knowledge, do affirm and state as follows:

1. My name is Allan C. Fisher and I have been Conrail's Director of Operating Rule since 1983. In my position I am responsible for the maintenance and instruction of Operating Rules throughout Conrail and establishment and monitoring of safe operating practices. I also have the responsibility for ensuring that Conrail is in compliance with Federal Rules and Regulations affecting all operating employees on Conrail.

2. Previously I have been a field operations officer for Conrail and its predecessor railroads beginning in 1970 and worked various locations as direct supervisor of Operating Department employees, including train and engine employees, ensuring safe and efficient operation of Conrail's trains. (See my resume attached as Exhibit "A").

3. In my entire career since early 1970 in the Penn Central and Conrail Operating Departments, time spent by crews awaiting deadhead transportation has never been considered as on duty time under the Hours of Service Act. This time was considered "limbo" time and our crews were paid consumed time until they reached their final off duty point and left the property to start their rest period under the Hours of Service.

4. During the last week of December, 1992 I issued a Standard Division Notice, which is a Special Instruction to all affected employees, explaining the FRA's new interpretation of the Hours of Service Act regarding crews awaiting deadhead transportation. It also explained how our train and engine crews should properly report

any apparent violation of the Hours of Service Act due to the new interpretaiton. (Exhibit "B").

5. Conrail continues to see that all employees understand that there are no violations of the Hours of Service Act caused by the movement of a Conrail train. The new interpretation of the Hours of Service Act requiring time spent by crews awaiting deadhead transportation to be reported as a violation of the Hours of Service has caused us to reevaluate the schedules for our crews over the road transportation plan and also our crew road transportation arrangements.

6. Even with instructions mandating strict compliance with the Federal Hours of Service Act for train operations, it is impossible to predict when a train will experience mechanical difficulties which will cause an unexpected delay to the train and a resultant expiration of the crew's time allowed under the Hours of Service Act at points where transportation is not readily available to be dispatched. Conrail is closely monitoring January and February 1992 operations to determine the extent of the problem. We may have to stop trains which ordinarily would have enough time to make their destination at a location short of the final destination to allow for potential equipment failures and crew road transportation unavailability. The cost in delays to customer traffic cannot be quantitatively assessed. However, I do know that when the railroad consistently fails to meet customer expectations their business is lost to the railroad forever.

7. Many of our intermodal and miscellaneous freight trains now traverse our system and arrive at customer sidings with one or two days less transit time than 10 years ago. All of this has been possible due to the tremendous reinvestment the railroads have made in their rights-of-way and equipment since deregulation. This investment has reduced the unproductive time spent by our crews on the railroad and have allowed for a much safer railroad. The reduction in Conrail train accidents

and personal injuries in the last 10 year period certainly reflects these improving trends.

8. These gains in productivity and changes at achieving a greater percentage of freight traffic then has been handled in the past could be jeopardized by a deterioration in service if the Federal Railroad Administration continues to maintain and enforce its new interpretation. Crews awaiting deadhead transportation are not working —they perform no railroad service. Thus, the safety purposes underlying the Hours of Service Act are not implicated. Furthermore, it has always been in the railroad's best interest to see that crews arrive at their off duty point and receive full rest as quickly as possible so that the railroad does not have to incur additional and unnecessary transportation costs.

/s/ Allan C. Fisher
ALLAN C. FISHER

[Notarization Omitted in Printing]

EXHIBIT A

ADDRESS

215 Poplar Avenue, Wayne, PA 19087 Telephone: (215) 687-5962

EDUCATION

Northwestern University, M.S. in Transportation, June 1970.

Transportation Center Fellowship, winter and spring quarters, 1968-69.

Urban Transportation Fellowship, fall quarter, 1969.

St. Lawrence University, B.A. in Economics, June 1965.

Dean's Award for Academic Improvement, 1964-65.

Officer of Sigma Chi, International Relations Club and two choral groups.

WORK EXPERIENCE

November 1983-Present: Director Operating Rules, System Office, Philadelphia, PA, Consolidated Rail Corpotion.

March 1982-November 1983: Regional Superintendent, Industrial Engineering Southern Region, Indianapolis, Indiana, Consolidated Rail Corporation.

March 1980-March 1982: Director Budget Controls, Finance Department, System Office, Philadelphila, PA, Consolidated Rail Corporation.

August 1978-March 1980: Regional Superintendent, Operations Improvement, Central Region.

January 1978-August 1978: Division Superintendent, Lehigh Division.

February 1977-January 1978: Division Superintendent, New Jersey Division.

February 1976-February 1977: Terminal Superintendent, Conway Yard.

November 1975-February 1976: Assistant Division Superintendent, Chesapeake Division, Penn Central.

October 1974-November 1975: Terminal Superintendent, Baltimore, Maryland.

July 1974-October 1974: Assistant Terminal Superintendent, Cleveland, Ohio.

August 1973-July 1974: Trainmaster, Penn Central Collinwood Yard, Cleveland, Ohio.

December 1972-August 1973: Terminal Trainmaster, Penn Central Robert R. Young Yard, Elkhart, Indiana.

October 1971-December 1972: Trainmaster, Penn Central Airline Junction Yard, Toledo, Ohio.

September 1970-October 1971: Night Assistant Trainmaster, Penn Central Englewood and 55th Street Yards, Chicago, Illinois.

January 1970-September 1970: Operating Management Trainee for Penn Central Company.

June 1969-October 1969: Research Economist for Transportation Research Department of General Motors Research Laboratories, Warren, Michigan.

MILITARY EXPERIENCE

January 1966-December 1967: U.S. Army Transportation Corps Officer. Received Bronze Star for meritorious service in Vietnam.

EXHIBIT B

CONRAIL® MEMORANDUM

DATE: December 16, 1992

TO: Transportation Superintendents

/s/ A. C. Fisher
FROM: A. C. FISHER Location: C 14-C

SUBJECT: Division Notice
Federal Hours of Service Act

The following Division Notice should be issued to be effective January 1, 1993.

(Q-) TO ALL TRAIN AND ENGINE SERVICE EMPLOYEES FEDERAL HOURS OF SERVICE ACT

The Federal Railroad Administration has accepted the Ninth Circuit Court's decision that time spent awaiting deadhead transportation is on-duty time under the Hours of Service Act.

Therefore, effective January 1, 1993 all Train and Engine service employees must properly report the details of all violations of the Hours of Service Act. This will be done on Train and Engine combined Yard or Road timeslip in the "Remarks" section as follows:

Example 1.

Hours of Service Violation

Train Movement to (specify location) until (specify time) ordered by Train Disptacher (specify name).

Example 2.

Hours of Service Violation

Waiting for deadhead transportation only at (specify location) until (specify time).

Example 3.

Hours of Service Violation

Train Movement to (specify location) until (specify time) ordered by Train Dispatcher (specify name) and waiting for deadhead transportation until (specify time).

These records are necessary to permit Conrail to make required reports of all violations to the FRA. Waiting for deadhead transportation time starts when train makes final stop and ends when deadhead transportation starts movement from location of outlawed train to final terminal for the crew.

All reports of violations are subject to comparison with crew transportation records which will indicate when vehicle arrived at outlawed train and the departure time from outlawed train location.

It is Conrail's policy to fully comply with the Federal Hours of Service Act. Violations of the Federal Hours of Service Act involving train movement are permitted only in extreme emergencies. Questions on this notice should be addressed to Division Manager of Operating Rules at telephone extension ————.

Distribution:

G. R. Comstock
R. R. Downing
D. R. Greer
R. E. Huffman
E. G. Motte
M. M. Owens

cc:

R. S. Pyson
G. N. Corcoran
R. E. Hatton
J. R. Beard
T. P. Dwyer
J. W. Fallon
R. E. Gratz
R. L. Hoover
G. M. Spiegel
J. H. Reid
A. D. Burnett
K. M. Dailey
A. F. Dowd
P. D. Harris
J. L. Kivowitz
R. D. Shilling
M. Hilleary

BEFORE THE
FEDERAL RAILROAD ADMINISTRATION

AFFIDAVIT OF WAYNE A. HATTON

I, WAYNE A. HATTON, based on my personal knowledge, do affirm and state as follows:

1. My name is Wayne A. Hatton. I am Vice President Transportation of Burlington Northern Railroad Company ("BN"), a position I have held since December 1989. My principal responsibilities involve planning, direction and control of system-wide transportation functions related to train and terminal operations, service design, and performance. Performance functions include allocation of freight equipment and locomotives across the BN system so as to maximize customer service levels at commensurate cost to the company.

2. I began my career with a predecssor of BN, the Chicago, Burlington & Quincy Railroad, as an Assistant Trainmaster in June 1966, nearly twenty-seven years ago. Prior to joining the former "Q," I worked for three years, from 1963-66 for the Elgin, Joliet & Eastern Railroad as an Assistant Trainmaster and a Financial Analyst. In September 1970, after the merger earlier that year of four BN-predecessor railroads including the "Q" to create the Burlington Northern, I became a Trainmaster for BN in Aurora, Illinois. For the next ten years, I progressed through various operating positions of increasing responsibility with BN, including various terminal management and equipment management positions, culminating in my promotion to Assistant Vice President Operations in May 1980. I assumed the position of Vice President and General Manager shortly thereafter in February 1981. From that time until I assumed my present position in December, 1989, I held a variety of Vice President positions across the BN system, including Vice President of Operations Services, and Vice President of Service Design.

3. Throughout my career at BN, I have accumulated a great deal of experience in nearly all facets of railroad operations and transportation, both at the terminal and system-wide levels. I have extensive experience with operations and transportation planning, including crew management functions. Based on this experience, I am thoroughly familiar with the requirements of the federal Hours of Service Act, and with BN's and its predecessors' practices with respect to that Act. I am also familiar with the historical interpretation, application, and enforcement of the Hours of Service Act by the Federal Railroad Administration ("FRA"). I have knowledge of the decision issued late in 1992 by the U.S. Court of Appeals for the Ninth Circuit in the *UTU v. Skinner* case, with respect to the application of the Hours of Service Act to "waiting time" or so-called "limbo-time." I am also familiar with the FRA's announced interpretation of that court decision, whereby effective January 1, 1993, that agency will consider such waiting time to be on-duty time under the Hours of Service Act throughout the United States. I have personal knowledge of the implications and impact of that decision on Burlington Northern.

4. BN is the longest railroad in North America, operating approximately 25,000 miles of track across 25 states and in two Canadian provinces. On average, BN operates in excess of 750 trains and handles nearly 12,000 carloads per day. To conduct these operations, BN employs between 2,100 and 2,200 crew starts on an average day.

5. Based upon my extensive experience in operations and transportation on BN and its predecessors, I can say that neither before the effectiveness of the 1969 Hours of Service Act ("HOSA") amendments in December 1970 nor after, was time waiting for deadhead transpor-

tation to the point of final release to be on duty time under the Act. Those amendments to the HOSA changed the legal requirements and practices in the industry with respect to the treatment of time spent deadheading to begin a tour of duty, and with respect to the treatment of deadhead transportation to the point of final release after a tour of duty.

6. In my experience, however, prior to the recent decisions of the Ninth Circuit and the FRA's related new policy, throughout my career at BN, the time a crew spends simply waiting for deadhead transportation to their release point after being relieved from duty has never been considered time on duty. Prior to the 1969 amendments to the HOSA, such waiting time was considered off duty time. After the 1969 amendment, these waiting periods have been regarded as "limbo" time, *i.e.*, neither time on duty nor as rest time off duty. Our policies and practices on BN with respect to the treatment of this time as off duty time and then as limbo time have been continuous and consistent throughout by career at BN, right up until January 1 of this year when the FRA acquiesced in the Ninth Circuit Court's decision. To my knowledge, the FRA has never considered our practices as inconsistent with or violative of the Hours of Service Act. I do not recall an instance where an FRA investigator identified our practices in this regard as a problem under the Hours of Service Act or cited BN for the practice.

7. In my opinion, based on years of practical experience with the requirements of the Hours of Service Act, the policy of treating this waiting time as either off-duty time or limbo time has a solid basis. Once an employee is relieved from duty, whether or not he has reached his maximum hours of duty under the HOSA, and whether or not he is at a point of final release at the time, that employee no longer has any duties to perform in connection with the movement of a train or otherwise. There being no further duties to perform, we have always

viewed this situation as one in which the work, fatigue, and safety objectives of the HOSA do not apply. To my knowledge, FRA adopted this understanding in its enforcement of the Hours of Service Act historically, and until the Ninth Circuit's decision late in 1992, did not take issue with this position. Indeed, the position represented by the FRA's new January 1, 1993 policy appears to be inconsistent with the whole concept of "covered service" and the additional obligations and safety concerns that attach when a certain type of work is "covered service." Where an employee has no additional duties to perform and is simply waiting for deadhead transportation, he cannot reasonably be regarded as performing "covered service."

8. In my experience, it has always been the practice of BN and its predecessors to make every effort to get deadhead transportation to employees relieved of duty as promptly as possible. As in nearly every aspect of railroad operations, occassionally there may be an exceptional situation. But in the vast majority of circumstances, BN utilizes every available resource to see to it that deadhead transportation gets to the employees quickly, and to see to it that the time spent waiting for that transportation is avoided or kept to an absolute minimum. This practice is not only better and more humane for our employees, but it minimizes the time lost before the employees have their necessary rest and can return to duty should they be needed. On occasion, we have taken extraordinary measures to minimize this waiting time, such as stopping an opposing train to pick up a crew in this situation and take them to the next appropriate town. On other occasions, we have put employees in buses or other forms of public transportation where appropriate, and have directed managers and officers of the company to personally provide the deadhead transportation for the crews so as to keep that waiting time to an absolute minimum. In winter weather situations, we have dispatched special snow plow or end-loader

equipment to minimize the waiting time. It is simply an inaccurate statement of historical practice to suggest that BN is unconcerned with the duration of "limbo time."

9. If the FRA's announced new policy regarding the treatment of these waiting time periods under the Hours of Service Act continues, there is no question in my mind that it will have a very substantial adverse effect on productivity at Burlington Northern. As a practical matter, it will shorten available work time under the HOSA, and will require the company to relieve crews from duty well prior to their maximum hours of work, contrary to the HOSA. In my opinion, this result will serve no objective of the Hours of Service Act, nor any legitimate safety goal. It will simply result in greater expense to the railroads for the same work.

Further Affiant sayeth not.

/s/ Wayne A. Hatton
WAYNE A. HATTON

[Notarization Omitted in Printing]

BEFORE THE
FEDERAL RAILROAD ADMINISTRATION

AFFIDAVIT OF ROBERT C. EWERS

I, ROBERT C. EWERS, do affirm and state the following:

1. My name is Robert C. Ewers and I have been employed by Norfolk Southern Corporation ("Norfolk Southern") as Manager Operating Rules since February 1, 1984. Norfolk Southern controls, by common stock ownership, Norfolk Southern Railway Company, which in turn owns 100% of the stock of the Norfolk and Western Railway Company. Prior to 1984, I was employed by Norfolk Southern, and before that (since 1965) by Norfolk and Western Railway Company, in the following positions in the order shown: Special Officer (Police Department), Management Trainee, Assistant Trainmaster, Trainmaster, and Assistant Manager Operating Rules.

2. My duties include responsibility for Norfolk Southern's Operating Rules, Safety and General Conduct Rules, Rules for Equipment Operation and Handling (Form NS-1), efficiency test program, annual rules examinations for certain salaried and scheduled employees in the Operations Division, and in general, all operating directives pertinent to safety of operations. Further, I am responsible for ensuring compliance with various federal regulations governing operation of the railroad, including recordkeeping and reporting requirements. I am currently Norfolk Southern's reporting officer for incidents of noncompliance with the Hours of Service Act, a responsibility I have been charged with since 1987 for both Norfolk Southern Railway Company and Norfolk and Western Railway Company. From 1984 until 1987, I was charged with the same responsibility for Norfolk and Western alone.

3. I have been a member of the Association of American Railroads Operating Rules Committee since 1984, and I served as Vice Chairman in 1989 and 1990 and as Chairman in 1991 and 1992. In addition, I am currently Chairman of Norfolk Southern Railway's System Safety and Operating Rules and Procedures Committee.

4. I had considerable experience in dealing with the Hours of Service Act as a Transportation Department field officer from 1968 until 1975. Since that time, my involvement has been substantially more extensive, including interpretation of all provisions of that Act and verifying the technical correctness of monthly reports of incidents of noncompliance before they are submitted to the Federal Railroad Administration. Also, as I said in paragraph 2 above, I have been reporting officer for incidents of excess service since 1984.

5. Prior to 1969 when a train crew was relieved of operating responsibilities, time spent awaiting deadhead transportation and time spent in deadhead service to the point of final release was considered to be time off duty. Subsequent to the 1969 amendments to the Hours of Service Act, and before January 1, 1993, this was considered as "limbo" time, *i.e.*, neither time on duty nor rest time for purposes of the Act. These applications of the Act have always been deemed as in compliance with the language and intent of the Act and pertinent regulations by both the railroad industry and the Federal Railroad Administration (including FRA's predecessor in enforcing federal rail safety laws, the Interstate Commerce Commission).

6. Pursuant to the decision of the United States Court of Appeals for the Ninth Circuit in *United Transportation Union v. Skinner,* 975 F.2d 1421 (9th Cir. 1992), and the Federal Railroad Administration's subsequent reinterpretation of the Hours of Service Act, which relies on the *Skinner* case, Norfolk Southern issued an operating directive effective January 1, 1993, to the effect that

time spent awaiting deadhead transportation by train and engine service crews after they were relieved of operating responsibities will be treated as time on duty.

7. In regard to the foregoing, it is my observation and opinion that the Norfolk Southern carriers and other railroads will, in many cases, suffer excessive delay to freight shipments and incur substantial expense because they will have to stop trains short of destination to avoid being found in noncompliance with the Act under the FRA's recent reinterpretation of it. For erample, when a crew is running tight on time, but still appears to be able to reach final destination before expiration of the 12-hour limit, any unanticipated delay such as a burst air hose or stopping in the interest of safety for a hot journal or other possible safety defect would be likely to result in a "violation" under the FRA's reinterpretation. It simply is not feasible under such circumstances to have transportation waiting for crews at or near all points where unanticipated stops might occur. The recent "snow hurricane" presented examples of where train runs were cancelled or shortened in order to minimize potential exposure to liability for violations of the Hours of Service Act under the FRA's reinterpretation.

/s/ Robert C. Ewers
(signed)

March 19, 1993
(date)

[Notarization Omitted in Printing]

BEFORE THE
FEDERAL RAILROAD ADMINISTRATION

AFFIDAVIT OF J. E. SANFORD

I, J. E. Sanford, based on my personal knowledge do affirm and state as follows:

1. My name is J. E. Sanford. I am General Director of Operating Practices for Union Pacific Railroad (UPRR). I have held this position since January 1, 1993. My duties include responsibility for UPRR operating rules, engineer training and certification, FRA Hours of Service reporting, FRA settlement conferences, railroad efficiency testing, and derailment prevention.

2. I began my railroad career as a brakeman September 6, 1955, with the UPRR on the Fifth District at Cheyenne, Wyoming. I worked for the UPRR in an agreement (union—represented) position until September 1969, when I was promoted to a non-agreement (management) position as Assistant Superintendent—Safety and Courtesy for the Wyoming Division headquartered at Cheyenne, Wyoming. Since that time, I have held a succession of non-agreement positions in the Operating Department of UPRR including the position of Trainmaster, Assistant Division Superintendent, Division Superintendent, and General Superintendent—Field Operations. Based upon this experience, I am thoroughly familiar with UPRR's practices regarding waiting time and the Hours of Service Act since 1955, as well as with federal regulatory practices regarding this subject. I am also aware of the operational problems that are created by FRA's recent determination that it will consider "waiting time" as on-duty time rather than "limbo time."

3. UPRR is one of the major providers of rail transportation services in the western half of the United States, providing rail transportation service to 18 states and interchanging with Mexico and Canada. UPRR's rail system consists of approximately 20,000 route miles; it averages approximately 1,400 train and 14,000 car loads per day.

4. When I began work for the UPRR as a brakeman in 1955, the Hours of Service Act allowed and, if circumstances dictated, UPRR did work a train crew right up to the 16-hour maximum prescribed under the Hours of Service Act. Any time spent by the train crew beyond this 16-hour period waiting for the arrival of transportation, or being transported back to the terminal where the crews would tie up, was considered off-duty time under the Hours of Service Act.

5. To my knowledge, none of the UPRR labor organizations or employees ever alleged prior to 1969 that the practice of considering the time waiting for transportation as off-duty time violated the Hours of Service Act. Nor, to my knowledge, did any federal agency or official ever claim or advise UPRR prior to 1969 that this practice violated the Hours of Service Act. Several inspectors during this period regularly visited UPRR's property and were familiar with the operating practices, including the practice of considering time waiting for deadhead transportation as off-duty time.

6. The Hours of Service Act was amended in 1969. The 1969 amendments provided for the reclassification of deadhead transportation to a duty assignment as on-duty time. The amendments also created a new category, which was neither on-duty nor off-duty time, for deadhead transportation from the duty assignment to the point of final release. This category of time became known as "limbo time." Subsequent

to the 1969 amendments, UPRR considered time waiting for deadhead transportation to be part of this "limbo time."

7. The FRA did not, to my knowledge, consider waiting time to be on-duty time during the administration of the Hours of Service Act ("HSA") between 1969 and 1991. Prior to 1991, the FRA took no exception to UPRR's practice of treating waiting time as part of "limbo time."

8. FRA's announced interpretation that effective November 1, 1992, for certain states in the jurisdiction of the Ninth Circuit Court, and January 1, 1993, for the rest of the nation, it will consider waiting time to be on-duty time creates significant operational problems and inefficiencies for UPRR with no attendant safety benefits. Previously, in those instances where a train crew would complete 12 hours of service while still in transit, UPRR was required only to identify a point (a track) where the crews could tie up the train prior to expiration of the 12 hours. Under the new interpretation, UPRR must attempt to stop the train sufficiently in advance of 12 hours to permit deadhead transportation or relief crews to be notified and to meet the crew at a tie-up point before the 12 hours has expired. This requires UPRR to reduce the time in which the train crew can actually operate the train during the 12-hour period authorized by the statute. In fact, UPRR previously required a train crew to notify the train dispatchers sufficiently in advance of the expiration of their on-duty time so that appropriate arrangements could be made in the event it appeared that the crew would be unable to reach its destination. Effective November 1, 1992, as a result of FRA's new interpretation regarding waiting time, this notice period has become more critical because train crews now have

to be stopped sooner and deadhead transportation or relief crews must be contacted much earlier.

9. Unanticipated delays in train operations inevitably result in train crews being unable to reach a destination within the 12-hour time limit despite the fact that UPRR's operations are scheduled to permit compliance with the Hours of Service Act. Under the new interpretation, UPRR must estimate to the best of its ability the time limit to arrange for deadhead transportation or a relief crew to meet the train at a point where it can be stopped. Not only will the train have to be stopped earlier than usual, but UPRR cannot absolutely predict or control the time that the deadhead transportation or the relief crew will arrive to meet the train. Delays can result from a variety of factors, including deadhead transportation or a relief crew not being immediately available, encountering delays or breakdowns en route, train delays, and communication mix-ups among the numerous parties who must coordinate this operation. Due to these logistical problems, UPRR inevitably will be exposed to fines when the deadhead transportation or the relief crew does not arrive in time, despite the best efforts of all concerned.

10. The fines UPRR will be subjected to, and the reduction in crew productivity that will occur as UPRR attempts to comply with FRA's new interpretation, does not advance the underlying safety goals of the Hours of Service Act. Once a train is stopped at the 12-hour limit, its crew is relieved of all train handling responsibility. Accordingly, there is no safety risk to either the public or the train crew associated with the historical practice of considering this waiting time as off-duty time or, subsequently, as "limbo time." Indeed, once the train crew is relieved from duty, UPRR does not require the train crew

to remain on the train. The crew is, and has always been, free to await deadhead transportation in a restaurant or other facility, if available, or to make its own way to the final point of release rather than await deadhead transportation provided by UPRR. At no time after a crew's hours of service has expired has the crew been held responsible for any operation of the train. Furthermore, UPRR's train crews normally do not have to await deadhead transportation for an extended period of time beyond their 12-hour limit.

Further affiant sayeth not.

/s/ Jack E. Sanford
JACK E. SANFORD

[Notarization Omitted in Printing]

BEFORE THE
FEDERAL RAILROAD ADMINISTRATION

PETITION FOR INTERPRETATION OF HOURS OF SERVICE ACT

I. INTRODUCTION

The Atchison, Topeka & Santa Fe Railway ("Santa Fe"), Burlington Northern Railroad Company ("BN"), Consolidated Rail Corporation ("Conrail"), CSX Transportation, Inc. ("CSXT"), Illinois Central Railroad Company ("IC"), Norfolk Southern Railway Company ("NS"), Norfolk and Western Railway Company ("NW"), Southern Pacific Transportation Company ("SP"), and Union Pacific Railroad Company ("UP") (hereinafter "Railroads"), which together account for more than 90 percent of the nation's rail lines, petition the Federal Railroad Administration ("FRA") for an interpretation of the Hours of Service Act ("HSA").

Specifically, the Railroads request an interpretative ruling that the time spent waiting for deadhead transportation by a train crew, which has been relieved from all train operating duties, is time off duty within the meaning of the HSA. Alternatively, the Railroads ask the FRA to interpret such waiting time as time "in deadhead transportation . . . from duty to . . . point of final release," *i.e.*, as "limbo time." Both interpretations are consistent with and required by the HSA and its history. Indeed, these were the prevailing and accepted interpretations under the HSA until 1992. As Congress intended, these prior interpretations provided a clearly defined safe harbor in which railroads could utilize train crews without fear of violating the HSA. These interpretations also were

easily administered by the railroads and FRA, and fully realized the HSA's safety objectives. Adoption of either interpretation would, of course, require the FRA to rescind its new interpretation of the HSA, under which a train crew is considered on duty until its transportation to point of final release arrives.

Under the new FRA interpretation, which is contained in memoranda provided by FRA to various railroads (*see* Appendix ("App.") A), an outlawed crew is considered to be on duty until "the expired crew ceases to be *THE CREW OF THE TRAIN*, which occurs when the transportation that will carry them back to the point of final release arrives." (emphasis added). This new FRA interpretation is accompanied by a series of "hypothetical examples of 'on duty' time covered by the United States Court of Appeals for the Ninth Circuit decision" in *United Transportation Union v. Skinner*, 975 F.2d 1421 (9th Cir. 1992) ("*UTU v. Skinner*"). The Railroads respectfully submit that this new, further interpretation is contrary to the HSA, its legislative history, and the settled application of the statute. While the Ninth Circuit's decision is binding on the FRA within that Circuit, this was no reason to compound that court's erroneous interpretation of the HSA extending an even more restrictive, and equally erroneous, interpretation nationwide.

Moreover, FRA's new interpretation of the HSA is, in effect, substantive rulemaking. The FRA, however, has in the past taken the position that it lacks substantive rulemaking authority under the HSA. Even if its new interpretation were characterized as an interpretive rule, the FRA should nonetheless invite public comment on its new interpretation, as well as the Railroads' Petition, because FRA's new interpretation departs from more than 80 years of practice under the HSA and will have substantive legal and practical effects on the railroad industry. In these circumstances, notice and comment rulemaking is a legal requirement even for an interpretive

rule. Even if it were not, sound agency decisionmaking dictates such procedures. In that regard, when FRA issued an interpretive rule under HSA in 1977, it provided the public with notice of the proposed rule and an opportunity to comment prior to issuing its final rule. Significantly, FRA's new interpretation substantially amended this earlier interpretive rule.

Because of the importance of the issue, and the very real possibility that the new interpretation will lead to an avalanche of de minimis violations, the Railroads request that FRA address this Petition as soon as possible and refrain from enforcing its new interpretation until after it acts on this Petition.

In Part II of this Petition, the Railroads lay out the historical treatment of time spent waiting for deadhead transportation under the HSA. This history conclusively shows that, with one exception, until *UTU v. Skinner*, this waiting time was never considered by anyone to be "on duty time." Additionally, it shows that in the 1969 Amendments to the HSA, Congress codified the historical treatment of such time as off duty time. In Part III of the Petition, the Railroads explain the many serious deficiencies in the Ninth Circuit's reasoning, which led it, and now the FRA, to clearly erroneous interpretations of the HSA. In Part IV, the Railroads review the FRA's actions since the Ninth Circuit decision. Finally, in Part V, the Railroads explain that the FRA should follow the Administrative Procedure Act and provide notice and an opportunity to comment before it embarks on a radically new interpretation of "waiting time" under the HSA. If, however, after considering this Petition, the FRA agrees with the Railroads' interpretation of the HSA, there is no need for a rulemaking proceeding, because the FRA will be adhering to the longstanding, congressionally ratified interpretation of the HSA.

II. HISTORICAL TREATMENT OF TIME SPENT WAITING FOR DEADHEAD TRANSPORTATION

A. *Original Enactment Of HSA (1907) Until 1966*

In 1907, the Hours of Service Act ("HSA") was enacted to enhance railroad safety by establishing limits on the number of hours continuously worked by train crews and certain other railroad employees. As originally enacted, the HSA prohibited covered employees from being "on duty" performing services in connection with the movement of a train "for a longer period than sixteen consecutive hours. . . ." 45 U.S.C. § 62. The Act also required that an employee reaching that 16 hour limit receive 8 (or 10 depending on whether the service was consecutive or aggregate) consecutive hours "off duty" or rest time before returning to service. Under the language of the original statute, all time during a 24-hour period was generally characterized as either "on duty" or "off duty" time.

The 1907 Act did not expressly define "on duty," "off duty," or what constituted continuous service. During the early years after the HSA's enactment, there was extensive litigation of what constituted on duty or off duty time for purposes of HSA, and the courts were required to address the issues in various factual contexts. The judiciary and the Interstate Commerce Commission ("ICC"), the federal agency originally responsible for administration of the HSA, developed the HSA's definitions over time as issues relating to the Act's administration arose. For example, early on, issues arose whether an intermittent break in an employee's tour of duty meant that service before and after the break was not continuous for purposes of calculating the 16-hour limit. Courts held that meal periods and other brief or "trifling interruptions," *United States v. Chicago, M. & P. S. Ry.*, 197 F. 624 (E.D. Wash. 1912), did not break continuous service and were to be considered on duty time where the employee had not been relieved from duty, could be re-

called at any moment, and had no opportunity to rest before being recalled. *See, e.g., Missouri, K. & T. R.R. v. United States*, 231 U.S. 112 (1913); *Chicago R.I. & P. R.R. v. United States*, 253 F. 555 (8th Cir. 1918) (meal periods); *United States v. Chicago M. & P.S. Ry. Co.*, 197 F. 624 (E.D. Wash. 1912) (meal periods and indefinite delays with no rest). Conversely, intermittent rest periods of three or four hours duration were held to be off duty time. *See, e.g., Southern Pac. Co. v. United States*, 222 F. 46 (9th Cir. 1915). In addition, courts were called upon to decide whether time spent by an employee deadheading to or from a duty assignment was on duty or off duty time. The courts unequivocally held that deadheading time should not be counted as "on duty" time. *See, e.g., United States v. Great Northern Ry.*, 285 F. 152 (9th Cir. 1922).

The ICC concurred with the judicial decisions holding that time spent deadheading was not time on duty under the HSA. *See, e.g.*, ICC Administrative Ruling No. 74 (1908), *reprinted in* ICC, The Hours of Service Act Administrative Rulings, at 3 (1926) (App. B). A related ruling further defined "on duty" time under the HSA as follows:

> The term "on duty" includes all the time during which the employee is performing service, or is held responsible for performance of service. An employee goes "on duty" at the time he begins to perform service or at which he is required to be in readiness to perform service, and goes "off duty" at the time he is relieved from service and from responsibility for performance of service.

ICC Administrative Ruling No. 287 (1908), *reprinted in* ICC, The Hours of Service Act Administrative Rulings, at 4 (1926).

As explained in more detail *infra*, even though train crews were occasionally required to work right up to the

16-hour limit before being relieved from further train operating responsibilities, the Railroads are unaware of any judicial or ICC decision concluding that the time spent waiting for transportation by such "expired" crews should be classified as on duty time. The absence of litigation over this waiting period, in contrast to litigation over just about every other waiting period and time computation issue under the HSA, is but one demonstration of the fact that no one—not carriers, unions, or the government—considered the industry practice of working crews right up to the maximum hours of service to be violative of the Act.

Indeed, as explained in the Affidavits of D.C. Eubank (App. C), who has worked for CSXT and its predecessors since 1955, Robert C. Ewers (App. D), who has worked for NS or NW since 1965, Allan C. Fisher (App. E), who has worked at Conrail or its predecessors since the early 1970's, Wayne A. Hatton (App. F), who has worked at BN and its predecessors since 1966, Arthur Henson (App. G), who has worked for SP since 1946, and J.E. Sanford (App. H), who has worked at UP since 1955, which the Railroads submit in support of this Petition, the consistent industry practice has been not to consider such waiting time as on duty time. Classification of such waiting time as on duty time would not make sense because once relieved from duty, regardless of their location, even on a train, these employees were not operating trains.

Thus, from 1907 until 1966, time spent waiting for transportation by employees who had reached, or were about to reach, their HSA limit unquestionably was not counted as time on duty.

B. *1966 Congressional Hearings On Amendments To HSA*

In 1966, proposed legislation to amend the HSA was introduced in both houses of Congress, at the request of

the rail unions representing operating employees.[1] The principal purpose of this proposed legislation was to reduce the maximum hours of service from 16 to 12. The legislation, as introduced, also proposed to classify interim rest periods of three or more hours as off-duty time. As explained, the prevailing practice at the time, as reflected in the case law under the HSA, was to regard an off duty period of three or more hours "as breaking continuity of service." *Amend Hours of Service of 1907: Hearings on H.R. 5196 and 8476 Before the Subcomm. on Transp. and Aeronautics of the Comm. on Interstate and Foreign Commerce*, 89th Cong., 2d Sess. 237 (1966) (statement of John H. Bush, Chairman, ICC) ("1966 House Hearings"); *see also Hours of Service of Railroad Employees: Hearings on S. 2180 Before the Surface Transp. Subcomm. of the Comm. on Commerce*, 89th Cong., 2d Sess. 148 ("1966 Senate Hearings").

As originally introduced, the bills did not contain any provision addressing treatment of deadhead time. The bills also did not address the issue of time spent waiting on a train by an "outlawed" crew for deadhead transportation. During the hearings on the 1966 proposals, however, the Brotherhood of Locomotive Firemen and Enginemen (now the United Transportation Union ("UTU")) advocated extension of time on duty to include time spent deadheading to and from duty assignment. 1966 House Hearings, at 289.

In the congressional hearings there was a great deal of testimony illustrating the industry practice of utilizing crews up to the maximum limit required by operating exigencies. For example, Rex Manion, Vice President Operations & Maintenance Department of the Association of American Railroads ("AAR"), testified as follows:

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[1] *See* S. 2180, 89th Cong., 2d Sess. (1966); H.R. 5196 and 8476, 89th Cong., 2d Sess. (1966).

> Suppose that a crew reaches the maximum limit of the hours-of-service law at a point 70 miles from its home terminal. . . . *The train would stop.*

1966 House Hearings, at 291 (emphasis added).

This testimony again demonstrated that the accepted practice under the HSA was to utilize crews up to the 16 hour limit on some occasions. In Mr. Manion's example, if waiting time was counted as time on duty, this crew should have had to shut down the train sufficiently in advance of reaching the 16-hour limit to allow for the arrival of transportation and a relief crew prior to the expiration of that limit. Further, as explained in the Eubank, Hatton, Henson, and Sanford Affidavits, Mr. Manion's testimony was consistent with the Railroads' practices at this time. Eubank Aff. ¶¶ 4-6; Hatton Aff. ¶ 6; Henson Aff. ¶ 4; Sanford Aff. ¶¶ 4-5. Neither the ICC nor the unions ever challenged this practice. In his Affidavit, Mr. Eubank explains that prior to 1969 his employer worked "a train crew the 16 hour maximum that was then applicable under" Eubank Aff. ¶ 4. "Any time spent by the train crew 16 hour period waiting for the arrival of transportation, of being transported back to a terminal where the crew's tour of duty would end, was considered off-duty time under" the HSA. *Id.* Similarly, as explained by Mr. Ewers, Mr. Hatton, Mr. Henson, and Mr. Sanford, the railroads they worked at also considered such time as off duty time during that period. Ewers Aff. ¶ 5; Hatton Aff. ¶ 6; Henson Aff. ¶ 4; Sanford Aff. ¶¶ 4-5.

Ultimately, the 1966 legislation never made it out of committee in either the House or the Senate. Rail labor would, however, urge the amendment of HSA again three years later.

C. *United States v. Pennsylvania Railroad*

In between congressional consideration of the HSA, the U.S. Attorney for the Western District of Pennsylvania, at the request of the ICC in its twilight as administrator of the HSA, brought an action in 1966 under the HSA against the Pennsylvania Railroad Company. In that case, apparently for the first time in the then 60-year history of the HSA, the government argued that time spent waiting for deadhead transportation by a crew, which had reached its maximum hours of service and been relieved from duty while still on the train, was on duty time for purposes of computing the maximum hours of service. The District Court found that such waiting time should be considered on duty time in *United States v. Pennsylvania Railroad*, 275 F. Supp. 345 (W.D. Pa. 1967).

In so ruling, the *Pennsylvania Railroad* court ignored the 60-year practice under HSA not to include such time as on duty time. Further, the *Pennsylvania Railroad* court misinterpreted the case law construing HSA, just as the Ninth Circuit would do 25 years later. The court relied on cases where the employees were required to return to service immediately following the break; none involved a situation where the employee had been relieved from further responsibility for operating the train.

The *Pennsylvania Railroad* case was an aberration in the history of the Act and was not followed by any other court until the *UTU v. Skinner* litigation nearly 25 years later. As explained *infra* at II.D, notwithstanding the *Pennsylvania Railroad* decision, both management and labor witnesses testified in the congressional hearings on the 1969 Amendments that the industry practice continued to be not to count time waiting for deadhead transportation by an expired crew as on duty time. *See* Eubank Aff. ¶ 6 (carrier practice did not change in light of *Pennsylvania Railroad* decision). Moreover, the Federal Railroad Administrator, who by then was charged with administering the HSA, did not even mention the

Pennsylvania Railroad case in his congressional testimony on the legislation which became the 1969 Amendments.

D. *1699 Amendments To HSA*

In 1969, legislation to amend the HSA, similar to that introduced in 1966, was reintroduced in Congress at the urging of rail labor.[2] Like the 1966 proposals, the 1969 bills proposed, *inter alia*, to reduce the maximum permissible hours of service from 16 to 12 and to count time spent on certain interim rest periods as time on duty. For the first time, the legislation also expressly proposed to count deadhead time both *to* and *from* duty assignment as "on duty" time for purposes of the maximum hours of service permitted under the HSA. The legislation, however, did not propose to reclassify time spent waiting for deadhead transportation by an expired crew as on duty time. In other words, with the exception of reducing the maximum hours of service and reclassifying deadhead transportation as on duty time, the legislation proposed to leave the existing industry practice under HSA as it was.

The House and Senate bills were the subject of extensive congressional hearings. The 1969 congressional testimony again established that the practice under the HSA was not to consider time waiting for deadhead transportation by an expired crew as on duty time. These hearings provide numerous examples of situations where an employee was not relieved from duty until he or she reached the 15 hour 59 minutes point. The following colloquy between Representative Tiernan and Charles J. Coughlin, the Grand Chief Engineer of the Brotherhood of Locomotive Engineers, was an example:

> Mr. Tiernan. Suppose the train is down the road, down the tracks 20 miles from the terminus and they get some difficulties in switching, or they get

[2] H.R. 8449 and S. 1938, 91st Cong., 1st Sess. (1969).

> put aside, and it goes 15 or 15½ hours they are out on the job.
>
> The dispatcher has to send a station wagon or other equipment or tell them to take a taxi back into town; is that correct?
>
> Mr. Coughlin. They often do that, yes sir.
>
> Mr. Tiernan. In other words, they have to get them off that equipment within the 16 hours?
>
> Mr. Coughlin. No. No. In your example this train breaks down 20 miles from the final terminal and the man is there 16 hours. *Many is the time that that man is liable to set there for 3 or 4 hours waiting for a car to come out and bring him in.*
>
> * * *
>
> Mr. Tiernan. *There is no safety violation there, in the sense that the crew cannot operate after 16 hours?*
>
> Mr. Coughlin. *That is correct.*
>
> * * *
>
> Mr. Coughlin. Let us take this example and if the carrier knows they cannot get you into your terminal within the 16 hours, *there is nothing to prevent the carrier from telling you to go off duty after you have been out there 15 hours and 59 minutes. Then you can wait there for 2 or 3 or 4 hours waiting for some type of transportation back into your home terminal* and they can call you within 8 hours after they have relieved you out on the road.

Hearings on H.R. 8449, H.R. 84, and H.R. 9515 Before the House Comm. on Interstate and Foreign Commerce, 91st Cong., 1st Sess., at 114-15 (1969) ("1969 House Hearings") (emphasis added). As this colloquy shows, even the unions did not consider such waiting time as on duty time.

There was extensive debate regarding the proposed inclusion of deadhead transportation both to and from point of duty to an employee's terminal as time on duty. The railroad industry strongly opposed this aspect of the legislation, with industry witnesses explaining the operational problems that would result from including deadhead transportation in time on duty. For example, an SP executive testified that:

> Southern Pacific Co. opposes the provisions in bill S. 1938 which include time of deadheading to or from duty as time on duty. In the first place, although deadheading time is paid for to the men just the same as working time, the employees have no duties to perform. It is time used for relaxing and rest. Needed flexibility in crew handling to provide adequate service to customers would disappear. Operating employees would be away from home much longer and their expenses as well as company expenses will increase without any corresponding benefits to either.

House of Service of Railroad Employees: Hearings Before the Subcomm. on Surface Transp. of the Senate Comm. on Commerce, 91st Cong., 1st Sess. 159 (1969) (statement of Sam B. Burton, Manager of Personnel, Southern Pac. Co.) ("1969 Senate Hearings").

Likewise, AAR spokesperson Rex Manion testified to the adverse impact the legislation would have on railroad operations:

> Mr. Manion. Let's look just for a moment at our proposal with respect to changing the deadhead amendment.
>
> What is provided for in the bill before you and also the bill as it was passed in the House is extremely rigid and would tie the railroad's hands way beyond any reason. What we are proposing here would permit the use of deadheading, and it is greatly required

> to balance crews where there is an imbalance in a traffic flow which is the case on many railroads, to provide crews in the case of additional business, provide people in the case of somebody becoming ill and so forth, and our proposal would still permit this without hamstringing us in the framework if the new hours of service limitations. . . . Under our proposal, we have increased the flexibility very greatly so that we could still run the railroad, but it would not be a part of his rest time at all. This, we think, is a very practical amendment and we certainly would hope you would give it very serious consideration.
>
> Senator Pearson. What do you understand the House provision to be on deadheading? I have a note here that it counts for total time of service to work but not from work. . . . As proposed in the Senate bill, it would count both ways as part of the hours of service.
>
> Mr. Manion. The reason for the change in the House was recognition of the fact that the provision as it appeared in the bill to begin with was impossible. It would be impossible to get a crew home under the provisions of the bill because we would have violated the hours of service regardless of what we did with them.

Id. at 129-30.

Congress ultimately struck a compromise on the issue of deadhead transportation along the lines outlined in Mr. Manion's testimony. Only deadhead transportation *to* a duty assignment was to be included in time on duty. Deadhead transportation *from* a duty assignment to point of final release was not to be counted as time on duty. Deadhead transportation *from* a duty assignment was, however, no longer considered as off duty time either. Excluding such deadhead transportation from time on duty took cognizance of operating problems, and its exclusion from off duty time meant it would not be counted

toward an employee's rest. In effect, the legislative compromise created a limited third category of time, which came to be known as "limbo time."

The legislative compromise made sense because the HSA's purpose of fostering the safe operation of trains by rested crews is realized by counting the time spent by crews traveling to the point of duty at the start of an assignment. However, at the end of a duty tour, while waiting for deadhead transportation and travelling back to the designated terminal, the safety concern of HSA is not implicated, because expired crews will no longer perform "covered service," *i.e.*, "the actual assembling or operation of trains." 49 C.F.R. Pt. 228, App. A, at 176. The legislative compromise did not penalize the railroads if something delays the arrival of the relief crew and the deadhead transportation.

Significantly, there was no mention of the *Pennsylvania Railroad* case in the 1969 legislative hearings or legislative history. As discussed, although the Federal Railroad Administrator testified before the House and Senate Committees, he never once referenced this case.[3] Indeed, the FRA took no position on the legislation at all. If *Pennsylvania Railroad* actually reflected the government's interpretation of the HSA prior to 1969, surely the case or the issue presented there would have been discussed at some point during the extensive 1969 congressional hearings on the HSA Amendments. However, there was no such discussion. Further, as explained in the next section of this Petition, the *Pennsylvania Railroad* decision also did not represent the FRA's view of the HSA after 1969. The *Pennsylvania Railroad* case was an aberration in the

[3] Congress created the Department of Transportation as a cabinet-level agency and transferred jurisdiction over various transportation-related matters, including railroad safety and the HSA, to the Secretary of Transportation in 1966. The Secretary in turn delegated authority over the HSA to the FRA. Pub. L. No. 89-670, § 6, 80 Stat. 937 (1966) (codified at 49 U.S.C. § 1655(e)(2)).

history of the HSA not followed by anyone until *U.S. v. Skinner*.

In the 1969 Amendments, Congress codified many of the railroads' practices under HSA and modified some of the other practices. Congress modified the parties' practices by adopting a detailed, specific definition of on duty time to include time spent in deadhead transportation to an assignment and including time spent waiting for deadhead transportation after a tour of duty had ended as "limbo time." However, Congress, while aware of the parties' practice of classifying time spent waiting by a train crew after release from duty as time off duty, did not address that issue in the amendments. Nor did the more detailed statutory definition of "on duty" specifically include such waiting time. Therefore, Congress necessarily must have intended that waiting time by an expired crew be characterized as off duty time just as it had been for the previous six decades. *See, e.g., Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979) (Congress is presumed to know prior interpretation of law; if amended legislation does not conflict with the prior interpretation, it is presumed that the prior interpretation reflects congressional intent); *see also Goodyear Atomic Corp. v. Miller*, 486 U.S. 174 (1988).

E. *FRA's Administration of HSA Amendments*

During its administration of the HSA prior to 1992, the FRA never considered time spent waiting for transportation by an expired train crew, which had been relieved from further train operating responsibility, to be on duty time. Indeed, after providing the public with notice and an opportunity to comment on its proposed interpretation of the HSA as amended, *see* 41 Fed. Reg. 42692 (Sept. 28, 1976) (App. I); 42 Fed. Reg. 27594 (May 31, 1977) (App. J), the FRA issued an interpretation of the HSA in 1977 defining "covered service" under the Act as "the actual assembling or operation of trains."

49 C.F.R. Pt. 228, App. A, at 176. Obviously, a crew relieved from duty awaiting transportation is not engaged in the "actual assembling or operation of trains." After the 1969 Amendments, the FRA interpreted the HSA to provide that, like deadhead transportation from point of duty, such waiting time should be considered "limbo time," *i.e.*, neither on duty nor off duty time.

The FRA provided the public with notice and an opportunity to comment to determine "whether the proposed interpretations represent a realistic application of the statutory language to actual conditions in the railroad industry. . . . FRA is concerned that the Act be administered in a way which will serve the beneficient purposes of the Act without producing unintended and unnecessary problems for carriers and their employees." 41 Fed. Reg. at 42692-93. Ironically, by its new interpretation, FRA has effectively amended its prior definition of "covered service" arrived at after a proper notice and comment rulemaking procedure.

Even though Congress amended the HSA in 1976, 1980, and 1988, there was no contention that this waiting time by an expired crew should be considered as on duty time or that the FRA's interpretation should be legislatively overturned. Thus, in the 84-year history of the HSA, until 1992, time spent waiting for deadhead transportation from point of duty was never considered on duty time, with the lone exception of *Pennsylvania Railroad*. The FRA never followed *Pennsylvania Railroad* and criticized it on several occasions. For example, in a letter from Raymond K. James, FRA's Chief Counsel, to J.R. Snyder, UTU National Legislative Director, addressing whether HSA "requires that crews whose twelve hours have expired be speedily deadheaded to a designated terminal for rest," Mr. James explained that, while the HSA did not expressly address the issue, the *Pennsylvania Railroad* case dealt with it. However, Mr. James stated that there were "real practical problems" in applying the

rule of *Pennsylvania Railroad* "to the wide range of situations in which employees are forced to await deadhead transportation following the expiration of the statutory period." He explained that the *Pennsylvania Railroad* also did not further the safety purpose underlying HSA because "[f]aced with the prospect that delays (avoidable or otherwise) in getting crews to trains might be viewed by the FRA as violations in themselves, carriers might elect to continue such crews to their destinations." Accordingly, "because no concrete detriment to railroad safety is ordinarily involved," the FRA viewed time spent waiting for deadhead transportation as "limbo time." Letter from Raymond K. James, FRA Chief Counsel, to J.R. Snyder, UTU National Legislative Director (Oct. 20, 1977) (App. K); *see also* Letter from Gregory B. McBride, Assistant Chief Counsel for Safety, to Lawrence M. Mann, Esq. (Aug. 4, 1989) (characterizing *Pennsylvania R.R.* as overbroad and no longer providing "useful guidance as to the current requirements of the Act") (App. L).

FRA's position was consistent with the Railroads' experience, as explained in the Eubank, Ewers, Fisher, Hatton, Henson, and Sanford Affidavits. After the 1969 amendments, the railroads treated waiting time as "limbo time" and the *Pennsylvania Railroad* decision did not change the practice of the industry or the federal government's enforcement policy. Eubank Aff. ¶¶ 6-8; Ewers Aff. ¶¶ 5; Fisher Aff. ¶ 3; Hatton Aff. ¶¶ 5-6; Henson Aff. ¶¶ 5-6; Sanford Aff. ¶¶ 6-7. Thus, from 1907 to 1992, the consistent, accepted, well-understood practice under the HSA has been to consider the time spent waiting for deadhead transportation by an expired crew as either time off duty or limbo time, but not as time on duty.

III. THE NINTH CIRCUIT'S *UTU v. SKINNER* DECISION

Although the operating unions had accepted the classification of time waiting by an expired crew for deadhead transportation as off duty or limbo time for the 80 or so years of the HSA, sometime in the late 1980's, the UTU and the Brotherhood of Locomotive Engineers ("BLE") began agitating for litigation challenging the longstanding treatment of such waiting time as something other than on duty time. The UTU began soliciting its members for complaints regarding violations of the HSA and relaying these complaints to the FRA's regional offices.

Eventually, BLE and UTU instituted actions in federal district court in Oregon and in California challenging the FRA's interpretation of waiting time under the HSA. The lawsuits were triggered by a letter from Gregory B. McBride, Assistant Chief Counsel for Safety, to Lawrence M. Mann, attorney for the unions, which refused to reclassify all time spent waiting for deadhead transportation as time on duty, and characterized the *Pennsylvania Railroad* as overbroad and no longer providing "useful guidance as to the current requirements of the Act." The Oregon federal district court ruled in favor of BLE, while the California federal district court dismissed the UTU's complaint for lack of standing. In a consolidated appeal, the Ninth Circuit held that the FRA's interpretation was unreasonable and substituted the court's own interpretation that such waiting time should be counted as time on duty for purposes of the HSA. *UTU v. Skinner*, 975 F.2d 1421 (9th Cir. 1992).

In the Ninth Circuit, the FRA defended its interpretation of the statutory phrase "deadhead transportation by an employee from duty to his point of final release" as including time spent waiting for such transportation chiefly on the basis of the judicial deference to agency statutory interpretations required by *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). While the court agreed that the HSA was ambiguous or silent on the issue in contention, it refused (wrongly, in the Railroads' view) to defer to the FRA. Instead, the Ninth Circuit found that the FRA's statutory interpretation was unreasonable and proceeded to substitute its own judgment for that of the FRA. The stated basis for the court's refusal to defer to the FRA's interpretation was the court's mischaracterization of pre-1969 case law under the HSA. The court found that the FRA's interpretation was

> at odds with an unbroken line of decisions by the Supreme Court and by this circuit that waiting time is time on duty under the HSA, and nothing in the 1969 amendments or in their legislative history contains any indication that Congress intended to change that longstanding rule.

975 F.2d at 1426.

In fact, with the one isolated exception of *Pennsylvania Railroad*, none of the cases relied upon by the Ninth Circuit even addressed the issue of time spent waiting for deadhead transportation.[4] Certainly, none, with the one exception, held it was time on duty. For this reason, it was unnecessary for Congress in 1969 to change the supposed "longstanding rule" that such waiting time was on-duty time. *There was no such rule.* To the contrary, as shown by the previous discussion and the Eubank,

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[4] These cases were: *Atchison, T. & S.F. Ry. v. United States*, 244 U.S. 336 (1917); *Missouri, K. & T. Ry. v. United States*, 231 U.S. 112 (1913); *United States v. Great Northern Ry.*, 285 F. 152 (9th Cir. 1922) (deadheading counted as time off duty); *United States v. Southern Pac. Co.*, 245 F. 722 (9th Cir. 1917); *Northern Pac. Ry. v. United States*, 220 F. 108 (9th Cir. 1915); *San Pedro, L.A. & S.L. R.R. v. United States*, 213 F. 326 (8th Cir. 1914); *United States v. Chicago, M. & S.P. Ry.*, 195 F. 783 (W.D. Wash. 1912); *United States v. Denver & R.G. R.R.*, 197 F. 629 (D.N.M. 1912).

Ewers, Fisher, Hatton, Henson, and Sanford Affidavits, the longstanding rule under the HSA was that such waiting time was not considered on duty time.

A review of the cases cited by the Ninth Circuit easily demonstrates that they do not support the court's erroneous conclusions. If the case involved waiting at all, the issue was whether intermittent short periods of release, *e.g.*, for meals or locomotive servicing, or delays caused by certain hindrances, after which the crew was required to resume operation of the train, constituted time on duty. *See, e.g., Atchison, T. & S. F. Ry.; Missouri, K. & T. Ry.; Southern Pac. Co.; Northern Pac. Ry.; Chicago, M. & S.P. Ry.; Denver & R.G. R.R.* These courts were only confronted with the question whether such periods broke the continuity of service for purposes of the HSA, not whether time spent waiting for deadhead transportation should be counted as time on duty, as the Ninth Circuit and the Oregon District Court implied. For this reason, the Supreme Court's pronouncement in *Missouri, K. & T. Ry.* that a crew is "nonetheless on duty when inactive '[t]heir duty is to stand and wait' " is inapplicable to the issue of time spent waiting for deadhead transportation. That case involved a crew waiting for its engine to be serviced before it *resumed* the same tour of duty, not a crew waiting for transportation after it *ceased* service. Other cases cited by the Ninth Circuit did not even involve any waiting period. For example, *Atchison, T. & S. F. Ry. v. United States*, 244 U.S. 336 (1917) involved whether exceeding the 16-hour limit was excused by the "Act of God" proviso to the HSA.

Proceeding from the demonstrably erroneous conclusion that, prior to 1969 and throughout the HSA's history, time waiting for deadhead transportation was uniformly considered time on duty, the Ninth Circuit went on to address the FRA's argument that the 1969 HSA Amendments reclassified such waiting time from time on duty to

limbo time. The court conducted a limited legislative history analysis to determine whether Congress expressed any intent to move waiting time out of the time on duty category and into the limbo time category. This inquiry was preordained to fail, because, as explained, except for the *Pennsylvania Railroad* case, no one either considered or treated this waiting time as time on duty under the HSA in the first place.

The court then rejected the FRA's argument that waiting time fell within the meaning of "in deadhead transportation" as it is stated in Section 61(b)(3)(C) of the HSA, which exempts deadhead transportation *from* duty to point of final release from the definition of time on duty. 45 U.S.C. § 61(b)(3)(C). In reaching this conclusion, the court pointed to language in the House Report accompanying the 1969 amendments that deadheading was "travel" and that "employees are riding as passengers," whereas employees who are waiting are not yet passengers. Rather, according to the court, they are still the crew of the train.

As a preliminary matter, the Ninth Circuit's recitation of language from the 1969 House Report is misleading. First, it referred to a definition not in the Act, "deadheading," instead of "in deadhead transportation." Although deadheading may connote travel, arguably only an overly narrow reading of the phrase "in deadhead transportation" would limit the meaning to just travel. Moreover, the court failed to recognize that, in the 1969 amendments, Congress implicitly included the waiting time that precedes deadhead transportation *to* duty assignment in the same category as the actual deadhead travel, *i.e.*, time on duty.

As the court accurately noted, the hearings record and the House and Senate Reports all focused on certain safety problems that had arisen in the industry because deadhead time and certain "rest periods" during a tour of duty had

been classified as time off duty. These safety concerns supported the reclassification of deadhead transportation *to* duty assignment and certain *interim* rest periods as time on duty based on the logical premise that the employee must operate or work in connection with the operation of a train *after* these periods of time. In that instance, the employee's fatigue may still affect the operation of the train. But Congress also recognized that deadhead transportation *from* duty did not present such safety concerns because the employee has been relieved from duty, even though not yet at the point of final release. The employee will not resume operation of the train until he has received the statutorily mandated rest period. Congress also knew that it would not further the safety objectives of the Act to classify the time spent deadheading *from* duty to point of final release as "time off duty," because the employees are not afforded real opportunities for rest. Thus, as explained *supra*, Congress struck a compromise that reclassified deadhead transportation time partially as time on duty and partially as "limbo time," *i.e.*, neither time on duty nor time off duty. This same congressional compromise reasonably supported the FRA's inclusion of time waiting for deadhead transportation in limbo time.

Another basis for the Ninth Circuit's decision was its misinformed belief, for which there was no record support,[5] that train crews retained duties even while awaiting deadhead transportation. The Ninth Circuit wrongly stated that "the parties agree that employees who must wait on a stopped train for the arrival of deadhead transportation bearing a relief crew retain certain contingent responsibilities and are not free to go and do as they

[5] Indeed, there apparently was no record, as such, before the court in *UTU v. Skinner* of how waiting time had actually been treated over time.

please." 975 F.2d at 1428. There was no such agreement by the parties. *See Brief of Appellant*, at 20-22, *UTU v. Skinner*, Nos. 91-35911 and 91-36061 (9th Cir. 1992).

Indeed, the FRA submitted contrary evidence before the district courts. For example, the Affidavit of Joseph W. Walsh, the FRA's Associate Administrator for Safety, was submitted before both district courts. In his affidavit, Mr. Walsh stated that "the agency has never interpreted the Act in such a way that 'if an employee was not free to come and go as he/she pleased at the point of relief, the time was considered on duty.' " Walsh Aff. ¶ 6. Similarly, in response to an affidavit submitted in support of the unions by R.E. Futrell, a former safety inspector for the FRA, Mr. Walsh stated that "the agency has never interpreted the Act in such a way that it was a violation if 'the crew was not free to leave the train at 12 hours.' If Mr. Futrell believed this was the correct interpretation, he was mistaken." *Id.* ¶ 8; *see also id.* ¶ 14 ("The fact that the crew was not permitted to leave the vicinity [of the train] is not sufficient to find that the crew was on duty.").

The court finally concluded that the FRA's inclusion of waiting time in deadhead transportation would "weaken the protections afforded the employees and the safety interests that underlie the HSA." 975 F.2d at 1428. This conclusion is demonstrably erroneous. If this statement were true, then the Ninth Circuit would also believe that Congress' action in creating the limbo time category weakened the employee protection and safety interests provided for by the HSA. Moreover, contrary to the assertions of the Oregon District Court, the FRA never argued that waiting time should be classified as time off duty. *See BLE v. Skinner*, No. 90-51-JV, slip op. at 8 (D. Or. 1991). Rather, it only contended that it should be classified as limbo time.

Thus, in its decision, the Ninth Circuit ignored the fact that Congress in the 1969 amendments codified the parties' practice under HSA of not including time waiting for deadhead transportation as on duty time. In addition, the Ninth Circuit also ignored the legislative compromise struck by Congress in those amendments and the rationale for that compromise, *i.e.*, that a balance must be struck between legitimate safety goals and railroad operating necessities.

IV. FRA AND UNION ACTIONS AFTER UTU V. SKINNER

In a letter dated October 28, 1992 from the FRA's Chief Counsel to the AAR, the Chief Counsel indicated the FRA's decision to accept the Ninth Circuit's decision, even while continuing to disagree with its rationale. The FRA stated that it would begin applying the Ninth Circuit's new interpretation of the HSA within the jurisdiction of that court effective November 1, 1992. Effective January 1, 1993, the FRA would extend this new interpretation to the rest of the country. Thus, ironically the FRA adopted as its official interpertation of the HSA a decision that is as vague and provides as little guidance as *Pennsylvania Railroad*.

During informal meetings with various railroad operating personnel after the FRA decided to adopt the Ninth Circuit's result, though not its reasoning, FRA officials initially indicated that what was of the most importance to the agency was good record keeping by the railroads and that carriers would not be penalized as long as crews were not kept waiting for an unreasonable amount of time. However, in a memorandum provided to certain railroads, which the FRA apparently now considers to be its final, new interpretation of the HSA on this issue, the FRA has adopted a much stricter interpretation of the HSA in light of the Ninth Circuit's decision. For example, while stating during the *UTU v. Skinner* litigation that the fact a crew was not free to leave the general vicinity of the train was not a *per se* violation of HSA, in the recent memorandum the FRA stated that this was no longer the case. Instead of determining violations of the HSA based on whether the crews performed any covered service, as was the practice in the past and is consistent with the underlying safety purpose of the HSA and reflects the balance struck by Congress in the 1969 legislative compromise, the FRA stated that the two critical events now for determining a violation are (1) the "time transportation *arrived*" and (2) the "time the expired crew ceased to be *the crew of the train.*" FRA Memo. 5 (emphasis in original).

Further, in response to inquiries by J.P. Jones, UTU's California State Legislative Director, the FRA stated that it views

> even limited incidental administrative actions as commingled with covered service even if such activity takes no more than a few minutes. *Accordingly, even a limited administrative task, despite its de minimis nature and probable lack of impact on railroad safety is considered time on duty for purposes of the Act.*

Letter from Perry A. Rivkind, FRA Acting Administrator, to J. P. Jones, UTU California State Legislative Director, at 1 (Jan. 27, 1993) (App. M). Emboldened by the FRA's extreme position, the UTU has instructed its members to report even the most de minimis of violations of the HSA to their representatives, who in turn will inform the FRA. *See* Letter from A.G. Delyea, UTU General Chairman to Local Chairmen, Santa Fe Coast Lines Feb. 12, 1993) (App. N.).

Thus, the FRA has decided upon an inflexible rule that fails to take into account the inherent unpredictability of rail operations and the essential need for flexibility in those operations. The FRA's new interpretation

is diametrically contrary to its 1977 interpretation, which had been adopted only after notice and comment were provided to ensure that "the Act be administered in a way which will serve [its] beneficient purposes . . . without producing unintended and unnecessary problems for carriers and their employers." 41 Fed. Reg. at 42693. Thus, FRA has in effect amended its prior interpretive ruling under the HSA, without providing any notice or comment.

In addition, as FRA admitted in its January 27 letter to the UTU, its interpretation fails to further the safety purposes underlying the HSA. Moreover, the new interpretation is contrary to the principle in the HSA that railroads have a "safe harbor" for the use of employees for a full consecutive 12-hour period. The HSA's 12-hour limit provides the railroads with a clearly demarked zone when it is necessary to work employees for the full statutory period to meet operating exigencies. With this knowledge, railroads have been able to schedule operations and respond to unforeseen circumstances with the flexibility that is so essential to the railroad industry. Indeed, this is what Congress intended in the 1969 amendments. The FRA's decision to classify waiting time as on duty time eviscerates the railroads' operational flexibility and has the effect of reducing the hours of service of railroad employees below the statutory provision of 12 hours, if a railroad is to comply with the FRA's new interpretation. This is so despite the fact that Congress, in the 1969 amendments where it modified some of the parties' practices under HSA, clearly did not do so with regard to the classification of waiting time for deadhead transportation.

As explained in the Affidavits accompanying this Petition, the FRA's new interpretation will result in hardship and operational problems for the rail industry, and administrative problems for the FRA, while failing to further the safety purposes of HSA.[6] In order to avoid penalties under the new interpretation, the Railroads will in many cases experience excessive delay to freight shipments and incur substantial expense by stopping trains short of their destination to avoid the possibility of noncompliance. For example, when a crew is running tight on time, but appears to be able to reach its final destination before expiration of the 12-hour limit, any unanticipated delay such as a defective air hose or stopping to inspect for a possible defect in equipment will result in a violation under the FRA's new interpretation. It is not possible under such circumstances to have transportation waiting for the crew at or near all points where an unanticipated stop could occur. Ewers Aff. ¶ 7.

Further, as explained in the Eubank Affidavit, before when a train crew completed 12 hours of service while still in transit, the carrier was required only to identify a point of rest enroute where the crew would tie up the train prior to expiration of its 12 hours. However, under FRA's new interpretation, a carrier must attempt to stop the train sufficiently in advance of 12 hours to permit deadhead transportation or a relief crew to be notified and to meet the crew at a tie-up point before the 12 hours have expired. This requires the railroad to reduce the time in which the train crew can actually operate

[6] Indeed, a recent General Accounting Office ("GAO") study of railroad compliance with the HSA's requirements revealed that railroads were in compliance with the Act 99.4 percent of the time. GAO Report at 2. In addition, GAO concluded that, from a safety standpoint, there was no need to reduce the maximum hours of service for engineers from 12 hours to 10 hours. *Id.* In arriving at its conclusions, GAO relied on data from four railroads, including BN, Santa Fe, and SP, which showed employees were sometimes worked up until the 12 hour limit. If these employees were then required to wait for deadhead transportation, it would be a violation of the HSA under FRA's new interpretation. However, in its report, GAO never stated that this was violative of the HSA. On the contrary, as explained, GAO found that the railroads were in compliance with the HSA over 99 percent of the time.

the train below the 12-hour period authorized by the HSA. Eubank Aff. ¶ 9; *see also* Fisher Aff. ¶¶ 6-8; Hatton Aff. ¶ 9; Sanford Aff. ¶¶ 8-9. In effect, the FRA administratively amended the HSA to reduce the maximum hours of service to less than 12 hours in many instances. Thus, FRA's new interpretation of HSA is contrary to the statute, the parties' past practices, and the realities of rail operations.[7]

V. REQUESTED ACTION

A. *Rescind New Interpretation*

The FRA must rescind its new interpretation of the HSA because it constitutes a substantive rule under the Administrative Procedure Act ("APA"). While the FRA was required to apply the Ninth Circuit's decision in *UTU v. Skinner* in that part of the country within the court's jurisdiction, it was under no legal compulsion to extend the decision to the rest of the nation. The FRA's voluntary decision to extend that decision nationwide, and its recent statements regarding what constitutes time on duty under HSA, constitute rulemaking under the APA. However, the FRA lacks rulemaking authority under HSA, 49 C.F.R. § 1.49(d); a fact it has recognized in the past. *See, e.g.*, Letter from Gregory B. McBride, Assistant Chief Counsel for Safety, to Lawrence M. Mann, Esquire (Aug. 4, 1989).

Notwithstanding the FRA's lack of rulemaking authority, it has promulgated a rule enforcing the HSA and binding the railroads subject to its jurisdiction. Under the APA, an agency is engaged in the "rulemaking" process when it formulates, amends, or repeals a rule. 5 U.S.C. § 551(5). The APA defines "rule" as

[7] The Railroads have also filed a petition for review of the FRA's new interpretation of the HSA with the United States Court of Appeals for the Seventh Circuit. *See Atchison, T. & S. F. Ry., et al. v. Department of Transp., et al.*, No. 93-1505 (7th Cir. filed Mar. 2, 1993).

> the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency . . .;

Id. § 551(4).

The FRA's new interpretation of HSA "is an agency statement of general . . . applicability and future effect designed to implement, interpret, or prescribe law or policy," *i.e.*, a rule. *Id.* The FRA's action has changed the Railroads' expectations and practices under the HSA, and exposes the Railroads to liability if they fail to comply. Thus, because FRA lacks rulemaking authority, it must rescind its new interpretation of HSA for that part of the nation outside of the Ninth Circuit.

B. *Engage In A Rulemaking Procedure*

It is clear that the FRA's new interpretation and enforcement of HSA substantially impact the Railroads and change the requirements that must be met to comply with the law, even though FRA might attempt to characterize them as constituting an "interpretive" rule. Therefore, the rule is substantive in nature and requires a formal rulemaking procedure. However, even if the new interpretation is considered an "interpretive" rule, notice and comment should still be provided.

Notice with the opportunity to comment must be afforded to interested parties where, as here, a rule "is intended to have a substantial impact upon a regulated concern." *FLRA v. United States Dep't of Navy*, 966 F.2d 747, 762 n.14 (3d Cir. 1992) (requiring notice and comment for interpretive rule that would bind regulated entity and "prohibit" what had previously been permitted). "If an agency seeks to apply a formal interpretation to future cases, fundamental fairness dictates that the affected public have at a minimum some con-

structive notice of the existence and content of that interpretation." *Id.* at 764. Indeed, as explained *supra*, that is exactly what FRA did in 1976 when it issued an interpretation of HSA, which defined, *inter alia*, "covered service." *See* 41 Fed. Reg. 42692 (Sept. 28, 1976); 42 Fed. Reg. 27594 (May 31, 1977). FRA provided notice and comment, because it was concerned about the impact its proposed interpretations would have on the day-to-day operations of the railroads. 41 Fed. Reg. at 42692. Further, it also was concerned about administering the HSA in a way that furthered safety, while at the same time avoiding unnecessary problems for the industry and the FRA. *Id.* at 42693.

The FRA should have done the same here, because it is clear that its new interpretation of the HSA will have a "substantial impact" on the Railroads' day-to-day operations without furthering the safety purposes of the Act. As explained in the Affidavits submitted in support of this Petition, the Railroads will experience great hardship because of the new interpretation in the form of fines, scheduling problems, and loss of flexibility in their operations. In addition, the new interpretation alters the longstanding definition of "covered service" under the HSA, which is "the actual assembling or operation of trains." 49 C.F.R. Pt. 228, App. A, at 176. Under FRA's new interpretation, covered service now includes the time spent waiting by expired crews for deadhead transportation. Thus, the new interpretation clearly alters the parties' settled practices under the HSA. As explained in the Affidavits, to comply with this interpretation and avoid liability, railroads will have to stop their crews well short of the 12 hour period to allow for waiting time.

Thus, before FRA can apply its "interpretive" rule under the HSA, it must provide notice of the new interpretation and the opportunity for interested parties to comment on the proposed rule as required by the APA, 5 U.S.C. § 553.

C. *Adopt The Interpretation Proposed By The Railroads*

As demonstrated by the foregoing discussion and the accompanying affidavits, the FRA's new interpretation of HSA is contrary to the 85-plus years of practice under the Act. The new approach serves no useful purpose, adds excessive and unnecessary operating costs, creates uncertainty regarding compliance with the HSA, and fails to advance the safety purposes underlying HSA. The Railroads request the FRA to adopt an interpretation outside of the Ninth Circuit that is consistent with the longstanding practice under HSA by classifying waiting time as off duty time.

In the alternative, the Railroads request that the FRA adopt its previous interpretation and consider such time as part of "limbo" time under HSA for that part of the country outside of the Ninth Circuit. While construing waiting time as off duty time is consistent with congressional intent, classifying such time as "limbo" time is certainly more consistent with the HSA than the Ninth Circuit's erroneous interpretation. If FRA chooses to adopt either of the interpretations suggested by the Railroads, notice and opportunity to comment will not be necessary because the FRA will simply be following its the longstanding, congressionally-ratified interpretation of the HSA.

While adoption of either of the suggested interpretations will lead to one interpretation of the HSA for that portion of the nation within the Ninth Circuit and one for the rest of the nation, that is a far more desirable situation than an erroneous interpretation of the HSA for the entire nation. Further, no matter what action FRA takes on the Railroads' Petition, there is certain to be more litigation over this issue, which will ultimately lead to a uniform interpretation of the HSA.

VI. CONCLUSION

As explained above, FRA's new interpretation of the HSA to include the time spent waiting by an "expired" crew for deadhead transportation as time on duty is contrary to the 85-plus years of practice under the HSA. The new interpretation will cause great hardship to the rail industry, while failing to further the underlying safety purposes of the HSA. FRA's new interpretation also constitutes substantive rulemaking despite its lack of rulemaking authority. Therefore, the Railroads respectfully request that FRA rescind its new interpretation and return to an interpretation of the HSA that classifies the time spent waiting by crews for deadhead transportation after being relieved from "covered service" as either time off duty or "limbo" time. In the alternative, even though FRA might label its actions as adoption of an "interpretive" rule, the APA nevertheless requires that interested parties be afforded notice and the opportunity to comment before FRA can enforce its new interpretation, which is what FRA has done in the past when adopting interpretive rules under the HSA.

Any comments, correspondence, or inquiries concerning this Petition should be addressed to the undersigned.

Respectfully submitted,

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Norfolk and Western Railway Co.,
Southern Pacific Transportation Co.,
Union Pacific Railroad Company

Dated: March 26, 1993

[Federal Register Notice, dated April 8, 1993]

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Part 228, Appendix A

Nationwide Applicability of a Decision of the United States Court of Appeals for the Ninth Circuit Concerning an Agency Interpretation of the Hours of Service Act; Miscellaneous Hours of Service Act Issues

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Statement of agency policy and interpretation.

SUMMARY: Notice is hereby given that, in acquiescence to the decision of the United States Court of Appeals for the Ninth Circuit in *United Transportation Union v. Skinner*, all time spent awaiting the arrival of a deadhead vehicle for transportation to the point of final release shall be treated by FRA as time on duty for purposes of the Hours of Service Act ("Act"), throughout the entire nation, and such time should be recorded as such and reports of excess service filed, as necessary, under the hours of service record keeping regulations. FRA is amending its current interpretive statement to reflect this policy change. In addition, FRA is amending the interpretive statement to reflect that the Rail Safety Enforcement and Review Act of 1992 has expanded the applicability of the Act and increased the maximum penalty for violations of the Act.

EFFECTIVE DATE: The agency interpretation contained in this document has previously taken effect, as explained below.

FOR FURTHER INFORMATION CONTACT: Edward R. English, Director, Office of Safety Enforcement, Office of Safety, FRA, 400 Seventh Street, S.W., Washington, DC 20590 (telephone: 202-366-9252); or David H. Kasminoff, Trial Attorney, Office of Chief Counsel, FRA, 400 Seventh Street, S.W., Washington, DC 20590 (telephone: 202-366-0635).

SUPPLEMENTARY INFORMATION:

Public Participation

In this notice FRA states that it has acquiesced in a decision of the United States Court of Appeals for the Ninth Circuit concerning the treatment of time spent awaiting arrival of deadhead transportation to the point of final release for purposes of the Act (45 U.S.C. 61-64b). Notice and comment procedures are unnecessary with regard to the general statement of policy and interpretation issued by this notice because such a statement is excepted from notice and comment procedure by virtue of 5 U.S.C. 553(b)(3)(A). Statements of policy are also an exception to the general requirement of publication at least 30 days prior to the effective date. See 5 U.S.C. 553(d)(2).

Effect of This Notice

On September 22, 1992, the United States Court of Appeals for the Ninth Circuit issued its decision in the related cases of *United Transportation* v. *Skinner* (No. 90-16741) (*"UTU"*) and *Brotherhood of Locomotive Engineers* v. *Skinner* (Nos. 91-35911, 91-36061) (*"BLE"*). *United Transportation Union* v. *Skinner*, 975 F.2d 1421 (9th Cir. 1992). Those cases concern FRA's interpreta-

tion of the Act as it pertains to the status of train crew members waiting for deadhead transportation to their point of final release.

The Court of Appeals upheld the decision of the district court in Portland in *BLE*, which found that all time spent waiting for transportation is to be considered on-duty time. In the *UTU* case, which was an appeal from the district court in San Francisco, the Court of Appeals affirmed the district court's order of dismissal as to the claims for injunctive relief and mandamus, but reversed the district court's dismissal of the entire case and remanded the case to that court for further proceedings consistent with the appellate court's opinion on the interpretive issue.

FRA has traditionally considered an employee on duty during the time spent awaiting arrival of the deadhead vehicle only if the employee actually has duties to perform. If the railroad had relieved the employee of all responsibility, we had considered the time spent merely waiting for the deadhead vehicle to arrive as "limbo time" (i.e., neither on nor off duty) for hours of service purposes.

Although we do not agree with the court's legal rationale, we have decided to accept its decision and treat it as binding. Given the ambiguity of the Act's pertinent provisions, the issue has always been a close one. While we do not agree that the conclusion reached by the court is compelled by previous case law, we believe the court's reading of the statute, like the interpretation FRA has held until now, to be reasonable.

Our traditional interpretation was based on the assumption that some railroads might choose to continue crews in train operation if having the crews tie up the train and await deadhead transportation would itself constitute a violation. We did not wish to encourage the less safe alternative of having the crews continue train operation after

expiration of their legally permissible hours. However, we had not seen evidence of such behavior in Oregon, where the interpretation of the district court had been in effect for more than a year. With increased penalties and individual liability now available for violations of the Act, we are more convinced that railroads will work to avoid violations and, if faced with an inevitable violation, choose the safer alternative.

Although awaiting deadhead transportation will now constitute time on duty and FRA will enforce the Act accordingly, FRA will, of course, continue to exercise its prosecutorial discretion, as it does in all areas, in deciding which cases warrant civil penalties or other enforcement action. Moreover, where civil penalties are assessed, FRA will treat more harshly the violations that are more likely to have a serious impact on safety, i.e., those violations involving actual train operation after the period permitted by the Act. In addition to the legal incentives to encourage compliance, it appears that railroads have an economic incentive to minimize time spent awaiting deadhead transportation, which is wholly unproductive time.

As our original interpretation made clear, we have long been concerned about the instances in which employees are held on trains for several hours awaiting deadhead transportation even in the absence of any valid emergency that might explain such an occurrence. To the extent the waiting periods are extremely lengthy, there is a chance that they could contribute to the cumulative exhaustion of the employee, despite the fact that the legally required rest period is provided upon arrival at the point of final release. In some cases, the railroads have "relieved" employees on the expiration of 11 hours and 59 minutes, which has meant that the employee was guaranteed as little as 8 hours off after having been involved in many hours of service for the carrier (e.g., almost 12 hours "on duty," several hours spent waiting, and potentially several

hours in deadhead transportation to the point of "final release"). Thus, to the extent that application of the Ninth Circuit's decision reduces the frequency of such instances, it should contribute to safety.

It is not unreasonable to posit that the Congress considered the proportionality of work and rest periods, in addition to their absolute duration, when fashioning the Act. Application of the Act in the manner required by the Ninth Circuit is also generally consistent with contemporary learning with respect to maintaining the alertness of shift workers.

Accordingly, in the interest of uniform application of the Act and to promote the safety of railroad operations, we are treating the Ninth Circuit's opinion as binding in the entire nation. We have done so in two stages. We considered the court's reading of the Act binding within the Ninth Circuit beginning at 12:01 a.m. on November 1, 1992. The Ninth Circuit includes Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington. We chose November 1 because that date was likely to precede or be very close to the issuance of the mandate by the Court of Appeals and railroads within that circuit have had every reason to expect that its mandate would be honored.

This meant that, starting on November 1, all time spent awaiting the arrival of a deadhead vehicle for transportation to the point of final release, if it occurred within the territory of the Ninth Circuit, was to be treated as time on duty, and such time was to be recorded as such and reports of excess service filed, as necessary, under 49 CFR part 228, subpart B.

For the remainder of the nation, we believed that a period of adjustment was necessary in order to permit railroads to train their employees who will be responsible for implementation of the decision. Railroads with operations outside the Ninth Circuit have not had reason, until

very recently, to believe those operations would be affected by the court's decision. We believed a period of 60 days would permit the necessary training to occur. Accordingly, we began to apply the Ninth Circuit's decision to operations outside that circuit at 12:01 a.m. on January 1, 1993.

In November 1992, FRA mailed copies of a letter to affected railroads that operate within the Ninth Circuit providing actual notice of the court's decision. At the same time, we wrote to the Association of American Railroads asking its cooperation in making known to its member railroads our intention to enforce the court's decision nationwide beginning January 1, 1993. This published notice is intended to further ensure that all concerned parties are in fact informed of our new policy.

On March 2, 1993, pursuant to 28 U.S.C. 2342(7), FRA was served with a Petition for Review of Agency Action filed in the United States Court of Appeals for the Seventh Circuit by The Atchison, Topeka, and Santa Fe Railway Company; the Burlington Northern Railroad Company; the Consolidated Rail Corporation; CSX Transportation, Inc.; the Illinois Central Railroad Company; the Norfolk Southern Railway Company; the Norfolk and Western Railway Company; the Southern Pacific Transportation Company; and the Union Pacific Railroad Company (Railroads). *Atchison, Topeka, and Santa Fe Railway Co. v. Peña* (No. 93-1505). The Railroads request that the court order FRA to rescind nationwide application of its new interpretation of the Act, provide notice to the public of its new interpretation, and provide interested parties with an opportunity to comment. In the alternative, the Railroads ask the court to interpret the Act as providing that time spent waiting by a train crew which has been relieved from further operating duties is not on-duty time for purposes of the Act.

FRA is amending its current interpretive statement in appendix A to 49 CFR part 228 to reflect the fact that

although time spent in deadhead transportation from the final duty assignment of the work tour to the point of final release is not computed as either time on duty or time off duty, all time spent awaiting the arrival of a deadhead vehicle for transportation to the point of final release shall be treated by FRA as time on duty for purposes of the Act.

Miscellaneous Issues

FRA is also amending its current interpretive statement in appendix A to 49 CFR part 228 to reflect the fact that section 5(a)(1) of the Act was amended by section 4 of the Rail Safety Enforcement and Review Act of 1992, Public Law 102-365, by striking "penalty of up to $1,000 per violation, as the Secretary of Transportation deems reasonable," and inserting in lieu thereof "civil penalty, as the Secretary of Transportation deems reasonable, in an amount not less than $500 nor more than $10,000, except that where a grossly negligent violation or a pattern of repeated violations has created an imminent hazard of death or injury to persons, or has caused death or injury, a penalty of not to exceed $20,000 may be assessed," and by adding at the end the following sentence: "In compromising a civil penalty assessed under this section, the Secretary shall take into account the nature, circumstances, extent, and gravity of the violation committed, and, with respect to the person found to have committed such violation, the degree of culpability, any history of prior or subsequent offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice may require."

In addition, section 5(a)(1) of the Act was amended by section 9 of the Rail Safety Enforcement and Review Act of 1992, Public Law 102-365, by striking the parenthetical clause and inserting, in lieu thereof, the following: "(including but not limited to a railroad; any manager, supervisor, official, or other employee or agent

of a railroad; any owner, manufacturer, lessor, or lessee of railroad equipment, track, or facilities; any independent contractor providing goods or services to a railroad; and any employee of such owner, manufacturer, lessor, lessee, or independent contractor)."

List of Subjects in 49 CFR Part 228

Penalties, Railroad employees, Reporting and recordkeeping requirements.

In consideration of the foregoing, 49 CFR part 228 is amended as follows:

PART 228—[AMENDED]

1. The authority citation for 49 CFR part 228 is revised to read as follows:

Authority: 45 U.S.C. 61-64b, as amended; 45 U.S.C. 437 and 438, as amended; Public Law 102-365; 49 App. U.S.C. 655(e), as amended; 49 CFR 1.49(d) and (m).

2. Appendix A to part 228 is amended:

(a) By adding a new paragraph after the first paragraph of *Deadheading*, under the undesignated centerheading "Train and Engine Service," and

(b) By revising the paragraphs for *Penalty* under the undesignated center heading "General Provisions" to read as follows:

Appendix A to Part 228—Requirements of the Hours of Service Act: Statement of the Agency Policy and Interpretation

* * * *

Train and Engine Service

* * * *

Deadheading. * * *

All time spent awaiting the arrival of a deadhead vehicle for transportation from the final duty assignment

of the work tour to the point of final release is considered on-duty time, regardless of whether the employee is given specific responsibilities to perform during this time. Although awaiting deadhead transportation constitutes time on duty and FRA enforces the Act accordingly, FRA treats more harshly violations that are more likely to have a serious impact on safety, *i.e.*, those violations involving actual train operation after the period permitted by the Act.

* * * *

General Provisions

(Applicable to all Covered Service)

* * * *

Penalty. As amended by the Rail Safety Improvement Act of 1988 and the Rail Safety Enforcement and Review Act of 1992, the penalty provisions of the law apply to any "person (including but not limited to a railroad; any manager, supervisor, official, or other employee or agent of a railroad; any owner, manufacturer, lessor, or lessee of railroad equipment, track, or facilities; any independent contractor providing goods or services to a railroad; and any employee of such owner, manufacturer, lessor, lessee, or independent contractor), except that a penalty may be assessed against an individual only for a willful violation. See appendix A to 49 CFR part 209. For violations that occurred on or after September 3, 1992, a person who violates the Act is liable for a civil penalty, as the Secretary of Transportation deems reasonable, in an amount not less than $500 nor more than $10,000, except that where a grossly negligent violation or a pattern of repeated violations has created an imminent hazard of death or injury to persons, or has caused death or injury, a penalty not to exceed $20,000 may be assessed.

Each employee who is required or permitted to be on duty for a longer period than prescribed by law or who

does not receive a required period of rest represents a separate and distinct violation and subjects the railroad to a separate civil penalty. In the case of a violation of section 2(a)(3) or (a)(4) of the Act, each day a facility is in noncompliance constitutes a separate offense and subjects the railroad to a separate civil penalty.

In compromising a civil penalty assessed under the Act, FRA takes into account the nature, circumstances, extent, and gravity of the violation committed, and, with respect to the person found to have committed such violation, the degree of culpability, any history of prior or subsequent offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

* * * *

Issued in Washington, DC, on April 2, 1993.

S. Mark Lindsey,
Acting Federal Railroad Administrator.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 93-2378

THE ATCHISON, TOPEKA, AND SANTA FE
RAILWAY COMPANY
1700 East Golf Road
Schaumburg, Illinois 60173,

BURLINGTON NORTHERN RAILROAD COMPANY
3800 Continental Plaza
777 Main Street
Fort Worth, Texas 76102,

CONSOLIDATED RAIL CORPORATION
Two Commerce Square
2001 Market Square
Philadelphia, Pennsylavnia 19101,

CSX TRANSPORTATION, INC.
500 Water Street
Jacksonville, Florida 32202,

ILLINOIS CENTRAL RAILROAD COMPANY
455 North Cityfront Plaza Drive
Chicago, Illinois 60611,

NORFOLK SOUTHERN RAILWAY COMPANY
Three Commercial Place
Norfolk, Virginia 23510,

NORFOLK AND WESTERN RAILWAY COMPANY
Three Commercial Place
Norfolk, Virginia 23510,

SOUTHERN PACIFIC TRANSPORTATION COMPANY
One Market Plaza
San Francisco, California 94105,

and

UNION PACIFIC RAILROAD COMPANY
1416 Dodge Street
Omaha, Nebraska 68179,
Petitioners,

v.

FREDERICO PENA
Secretary of Transportation
400 Seventh Street, S.W.
Washington, D.C. 20590,

DEPARTMENT OF TRANSPORTATION
400 Seventh Street, S.W.
Washington, D.C. 20590,

S. MARK LINDSEY
Acting Administrator
Federal Railroad Administration
400 Seventh Street, S.W.
Washington, D.C. 20590,

and

FEDERAL RAILROAD ADMINISTRATION
400 Seventh Street, S.W.
Washington, D.C. 20590,
Respondents.

PETITION FOR REVIEW OF AGENCY ACTION BY THE FEDERAL RAILROAD ADMINISTRATION

Pursuant to 28 U.S.C. § 2342(7), Petitioners The Atchison, Topeka, and Santa Fe Railway Company ("Santa Fe"), Burlington Northern Railroad Company ("BN"), Consolidated Rail Corporation ("Conrail"), CSX Transportation, Inc. ("CSXT"), Illinois Central Railroad Company ("IC"), Norfolk Southern Railway Company ("NS"), Norfolk and Western Railway Company ("NW"), Southern Pacific Transportation Company ("SP"), and Union Pacific Railroad Company ("UP") (hereinafter "Railroads") Petition for Review of the Respondents' erroneous interpretation and application of the

Hours of Service Act ("HSA"), 45 U.S.C. §§ 61-66. On April 8, 1993, the Federal Railroad Administration ("FRA") published in the *Federal Register* a "Statement of Agency Policy and Interpretation" amending the FRA's prior interpretation of the HSA. 58 Fed. Reg. 18,163-66 (Apr. 8, 1993) (attached as Appendix A).

Since the HSA was enacted in 1907, the time spent waiting by a train crew for transportation, after being relieved from any further train operating duties, was never considered "on duty" time for purposes of calculating the maximum period that a train crew can be on duty under the HSA. Such time was considered off duty time at least until the 1969 amendments to the HSA. After the 1969 amendments, Respondent FRA considered such time to be "limbo time," *i.e.*, neither on duty nor off duty time. FRA now seeks to reinterpret the HSA and reclassify this waiting time as on duty time, based on the United States Court of Appeals for the Ninth Circuit's decision in *United Transportation Union v. Skinner*, 975 F.2d 1421 (9th Cir. 1992). Despite the fact that both the Railroads and FRA disagree with the Ninth Circuit's interpretation of the HSA, FRA, which was under no legal compulsion to do so, extended the Ninth Circuit interpretation to all railroads nationwide on January 1, 1993.

In FRA's April 8, 1993 "Statement of Agency Policy and Interpretation," FRA reiterates its disagreement with the Ninth Circuit's "legal rationale" yet continues to adhere to that erroneous rationale. In its *Federal Register* notice, the FRA amended the interpretive statement in appendix A to 49 C.F.R. part 228 "to reflect the fact that . . . all time spent awaiting the arrival of deadhead tarnsportation to the point of final release shall be treated by FRA as time on duty for purposes of [HSA]." 58 Fed. Reg. at 18,165. The FRA's actions are contrary to the statutory language and 85-plus year history of the HSA. FRA's actions in including the time spent waiting by a train crew that has been relieved from further operating duties as on duty time under the HSA and extending its erroneous interpretaton of the HSA nationwide are arbitrary, capricious, and not in accordance with the law and contrary to the HSA. In addition, the FRA's actions violate the Administrative Procedure Act ("APA"), because the agency engaged in rulemaking without providing the public notice of the proposed rules and an opportunity for interested parties to comment on the proposed rule.

The Railroads request that this Court order the FRA to rescind nationwide application of its new interpretation of HSA, provide notice to the public of its new interpretation, and provide interested parties with an opportunity to comment. In the alternative, the Railroads ask this Court to interpret the HSA to provide that time spent waiting by a train crew which has been relieved from further operating duties is not on duty time under the HSA. Such an interpretation is required by the statute and the legislative history.

The Railroads have previously petitioned this Court for review of prior FRA actions in violation of the HSA and APA, *see Atchison, Topeka, and Santa Fe Railway Co., et al. v. Pena, et al.*, No. 93-1505 (filed Mar. 2. 1993). Further, on March 26, 1993, the Railroads filed with the FRA a Petition for Interpretation of the HSA. The FRA has stated that it will issue an order in response to the Railroad's Petition for Interpretation by June 15, 1993. On April 21, 1993, this Court ordered the appeal in Docket No. 93-1505 held in abeyance pending the FRA's June 15 order. The Railroads will also file a motion to hold their appeal of FRA's April 8 *Federal Register* order in abeyance pending the FRA's resolution of the Railroad's Petition for Interpretation. In addition, at a later date, the Railroads will move to consolidate this appeal with the appeal in Docket No. 93-1505.

Venue is proper in this Court pursuant to 28 U.S.C. § 2343, because Petitioner IC's principal office is located in Chicago, Illinois.

Respectfully submitted,

/s/ Mark V. Holden

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Dated: June 7, 1993

[Appendix A and Certificate of Service Omitted in Printing]

[July 1, 1993, letter from Grady C. Cothen, Jr. to Ronald M. Johnson and Mark V. Holden]

U.S. Department
of Transportation

Federal Railroad
Administration

Office of the Administrator

400 Seventh St. S.W.
Washington D.C. 20590

[Jul. 1 1993]

BY HAND

Ronald M. Johnson, Esq.
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1333 New Hampshire Avenue, N.W.
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Re: Petition for Interpretation of the Hours of Service Act

Dear Mr. Johnson and Mr. Holden:

On March 26, 1993, FRA was served with a Petition for Interpretation of the Hours of Service Act ("Act") by The Atchison, Topeka, and Santa Fe Railroad Company; the Burlington Northern Railroad Company; the Consolidated Rail Corporation, CSX Transportation, Inc.; the Illinois Central Railroad Company; the Norfolk Southern Railway Company; the Norfolk and Western Railway Company; the Southern Pacific Transportation Company; and the Union Pacific Railroad Company ("Railroads"). Further, on May 19, 1993, the Railroads filed a Supplement to their Petition.

In that Petition and its Supplement, the Railroads request that FRA rescind nationwide application of its new interpretation of the Act, in which FRA states that all time spent awaiting the arrival of a deadhead vehicle for transportation from the final duty assignment of the work tour to the point of final release is considered on-duty time, regardless of whether the employee is given specific responsibilities to perform during this time. In the alternative, the Railroads argue that since, in their view, FRA's new interpretation will have a substantial impact on the day-to-day operations of the Railroads, FRA should provide the opportunity for notice and comment in accordance with the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.* ("APA"). As a third alternative, the Railroads ask FRA to adopt one of two interpretations they favor, *i.e.*, that time spent awaiting deadhead transportation is time off duty, or that such time is "limbo" time (neither on-duty nor off-duty time).

As a threshold matter, FRA notes that its rules of practice, 49 C.F.R. Part 211, do not provide any procedure for handling a "petition for interpretation." Accordingly, without reaching its merits, FRA could simply dismiss the Petition as improperly filed. However, because one aspect of the Petition could arguably be read as a petition for rulemaking, and in order to avoid debate at this time over issues of administrative procedure, FRA has decided to entertain the Petition. For the reasons set forth below, FRA denies all of the Railroads' requests.

The FRA interpretation in dispute applies the decision of the United States Court of Appeals for the Ninth Circuit in *United Transportation Union* v. *Skinner,* 975 F.2d 1421 (9th Cir. 1992) nationwide. In both our October 28, 1992 letter to Robert W. Blanchette, Vice President-Law and General Counsel of the Association of American Railroads ("AAR") (Blanchette letter), and in our Statement of Agency Policy and Interpretation" (58 Fed. Reg.

18,163) (April 8, 1993) (Federal Register notice), we acknowledged our disagreement with the court's legal rationale, but conceded both the ambiguity of the Act's pertinent provisions and the reasonableness of the court's reading of the statute. Accordingly, in the interest of uniform application of the Act and to promote the safety of railroad operations, we decided to treat the court's opinion as binding throughout the entire nation.

The Petition and Supplement provide no persuasive rationale for rescinding FRA's new interpretation. The legal arguments presented by the Railroads are essentially those on which FRA relied, unsuccessfully, in *UTU* v. *Skinner*. Obviously, FRA was aware of those arguments when it decided to accept the Ninth Circuit's ruling. The Petition includes affidavits from various railroad officials designed to show how the Act had been applied historically. While their recollections may be fully correct, they have no bearing on what FRA now believes to be the correct reading of the Act. Therefore, we see nothing in the Petition or supplement that persuades us to rescind the agency's current interpretation or adopt either of those preferred by the railroads.

Moreover, FRA does not believe that it is obligated to provide notice and an opportunity to comment on its revised interpretation, or that doing so would be useful at this time. FRA's interpretation is an "interpretative rule" and statement of policy within the meaning of the APA, 5 U.S.C. § 553(b)(A). As such, notice and comment were not required prior to its publication. As the agency charged with enforcing and administering the Act, FRA has inherent authority to issue interpretive rules informing the regulated community of the procedures and standards that it intends to apply in exercising its discretion. *See Metropolitan School District of Wayne Township* v. *Davila*, 969 F.2d 485, 490 (7th Cir. 1992); *Production Tool* v. *Employment & Training Administration*, 688 F.2d 1161, 1166 (7th Cir. 1982) (citing *General Electric Co.*

v. *Gilbert*, 429 U.S. 125 (1976)). Moreover, given the nature of the subject—the proper reading of the Act—there would seem to be nothing to be gained from public comment, as FRA is fully familiar with the legal arguments on both sides of the issue.

The Railroads argue that FRA's interpretation actually constituted a substantive rule. However, other than by arguing that the interpretation will have an impact they disfavor, the Railroads do not explain how FRA's statement of its reading of the Act constitutes substantive rulemaking. Every interpretation is likely to disfavor someone, but that does not make every interpretation an exercise of legislative rulemaking authority.

This is especially true where, as here, the agency lacks legislative rulemaking authority on the subject. The Railroads concede on pages 33 and 34 of their March Petition that FRA lacks rulemaking authority under the Act. (The lone exception, dealing with employee sleeping quarters, is not relevant here.) In the absence of a delegation of legislative authority, a rule is considered interpretive even if it affects the rights and obligations of a party. *Production Tool*, 688 F.2d at 1166; *See Alcaraz* v. *Block*, 746 F.2d 593 (9th Cir. 1984); *Rivera* v. *Becerra*, 714 F.2d 887 (9th Cir. 1983). Accordingly, notice and comment procedures were unnecessary with regard to FRA's general statement of policy and interpretation because such a statement is expected from notice and comment procedure by virtue of 5 U.S.C. § 553(b)(A). Even assuming that FRA's interpretation has a substantial impact upon the Railroads, the Supreme Court, in *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519 (1978), cast considerable doubt upon the viability of cases holding that the notice and comment procedure may be judicially required even where not required by the terms of the APA. *See also Rivera*, 714 F.2d at 890, 891. Statements of policy are also an exception to the general

requirement of publication at least 30 days prior to the effective date. 5 U.S.C. § 553(d)(2).

Further, the Railroads argue that even assuming FRA's new interpretation is interpretive, ". . . fundamental fairness dictates that the affected public have at a minimum some constructive notice of the existence and content of that interpretation" (quoting language from *FLRA* v. *United States Department of Navy*, 966 F.2d 747, 764 (3d Cir. 1992)). While the Railroads are obviously correct in their assertion, they neglect to admit that FRA provided something more than just constructive notice—FRA also gave *actual* notice to the Railroads. Copies of the Blanchette letter were mailed to all roadroads that operate in the Ninth Circuit, including four of the petitioner Railroads. Also, in the Blanchette letter, FRA requested that the AAR inform its member railroads (which include all petitioner Railroads) of FRA's revised interpretation. Apparently, AAR did so. In fact, at least one of the petitioner Railroads received a copy of an FRA technical bulletin on this subject issued after the Blanchette letter. *See* notation at top of Appendix A to Petition. Finally, any question of constructive notice has been eliminated by FRA's publication of its Federal Register notice on April 8, 1993.

The Railroads note that in 1976 FRA sought public comment prior to issuing its "Statement of Agency Policy and Interpretation on the Hours of Service Act, as Amended." *See* 41 Fed. Reg. 42,692 (September 28, 1976), and 42 Fed. Reg. 27,594 (May 31, 1977) (codified at Appendix A to 49 C.F.R. Part 228, as amended). The Railroads argue that the fact that FRA provided notice and opportunity for comment at that time is somehow precedential, and also argue that the 1977 statement spoke to the present issue by defining "covered service." Petition at 35-36. FRA disagrees on both scores.

In its 1976 Notice of Agency Interpretation, FRA stated that the Act had recently been amended in several significant respects, and sought public comment as to whether the proposed interpretation would realistically apply the statutory language to actual conditions in the railroad industry. 41 Fed. Reg. at 42,692. However, FRA specifically stated that public proceedings concerning publication of an appendix to 49 C.F.R. Part 228 were not required by law or agency rules. *Id.* at 42,693. By contrast, the issue now before FRA stands alone and has a long history of interpretation and application with which FRA is fully familiar. Accordingly, FRA acted voluntarily—not because of the APA—when it provided an opportunity for comment in 1976, but had no similar incentives to seek comment in this situation and was under no legal obligation to do so.

Moreover, the 1977 policy statement did not address the proper treatment of time spent awaiting deadhead transportation from duty. That statement's definition of "covered service" is irrelevant, because the issue is whether waiting time is time on duty, whether it be commingled or covered service. Actually, the interpretation that FRA recently adopted overturns an earlier interpretation embodied only in letters (*e.g.*, Appendices K and L to Petition). Therefore, it is simply not true to suggest that FRA has overturned by letter interpretation a position previously embodied in a published interpretation.

Finally, the Petition (at 2) cites an FRA memorandum (Appendix A to Petition) as the embodiment of FRA's interpretation. Actually, the interpretation is embodied in the Blanchette letter and the April 8, 1993 Federal Register notice. The memorandum constitutes field guidance on application of the interpretation. In its guidance to its field inspectors, FRA tried to anticipate factual scenarios that may not have been squarely addressed in the Ninth Circuit's opinion.

For example, the memorandum addresses the situation in which the first crew is ordered to leave the vicinity of the

train (*e.g.*, by walking to a restaurant), but no deadhead transportation has arrived. Even if the crew gets off the train and walks to a nearby restaurant, the crew is still considered *on duty* until deadhead transportation arrives.

We have given your Petition and its Supplement every consideration, but conclude that we cannot grant the relief requested. Accordingly, as set forth above, we must deny that Petition.

Sincerely yours,

/s/ Grady C. Cothen, Jr.
GRADY C. COTHEN, JR.
Acting Administrator

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 93-2712

THE ATCHISON, TOPEKA, AND SANTA FE
RAILWAY COMPANY
1700 East Golf Road
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BURLINGTON NORTHERN RAILROAD COMPANY
3800 Continental Plaza
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CONSOLIDATED RAIL CORPORATION
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CSX TRANSPORTATION, INC.
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ILLINOIS CENTRAL RAILROAD COMPANY
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NORFOLK SOUTHERN RAILWAY COMPANY
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NORFOLK AND WESTERN RAILWAY COMPANY
Three Commercial Place
Norfolk, Virginia 23510,

SOUTHERN PACIFIC TRANSPORTATION COMPANY
One Market Plaza
San Francisco, California 94105,

and

UNION PACIFIC RAILROAD COMPANY
1416 Dodge Street
Omaha, Nebraska 68179,
Petitioners,

v.

FREDERICO PENA
Secretary of Transportation
400 Seventh Street, S.W.
Washington, D.C. 20590,

DEPARTMENT OF TRANSPORTATION
400 Seventh Street, S.W.
Washington, D.C. 20590,

GRADY C. COTHEN, JR.
Acting Administrator
Federal Railroad Administration
400 Seventh Street, S.W.
Washington, D.C. 20590,

and

FEDERAL RAILROAD ADMINISTRATION
400 Seventh Street, S.W.
Washington, D.C. 20590,
Respondents.

PETITION FOR REVIEW OF AGENCY ACTION BY THE FEDERAL RAILROAD ADMINISTRATION

Pursuant to 28 U.S.C. § 2343(7), Petitioners The Atchison, Topeka, and Santa Fe Railway Company ("Santa Fe"), Burlington Northern Railroad Company ("BN"), Consolidated Rail Corporation ("Conrail"), CSX Transportation, Inc. ("CSXT"), Illinois Central Railroad Company ("IC"), Norfolk Southern Railway Company ("NS"), Norfolk and Western Railway Company ("NW"), Southern Pacific Transportation Company ("SP"), and Union Pacific Railroad Company ("UP") (hereinafter "Railroads") Petition for Review of the Respondents' erroneous interpretation and application of the Hours of Service Act ("HSA"), 45 U.S.C. §§ 61-66.[1] On July 1, 1993, the Federal Railroad Administration ("FRA") denied the Petitioners' Petition for Interpretation. *See* Letter from Grady C. Cothen, Jr., Acting FRA Administrator, to Ronald M. Johnson and Mark V. Holden (July 1, 1993) ("July 1 Decision") (attached as Appendix A).

In their Petition for Interpretation and the Supplement to the Petition, the Railroads requested that the FRA rescind naionwide application of its new interpretation of the HSA and return to the prior longstanding interpretation of HSA. In the alternative, the Railroads requested that FRA provide interested parties with notice of the new interpretation and an opportunity to comment on that interpretation, as required by Administrative Procedure Act ("APA"), 5 U.S.C. § 553.

Since the HSA was enacted in 1907, the time spent waiting by a train crew for transportation, after being relieved from any further train operating duties, was never considered "on duty" time for purposes of calculating the maximum period that a train crew can be on duty under the HSA. Such time was considered off duty time at least until the 1969 amendments to the HSA. After the 1969 amendments, Respondent FRA considered such time to be "limbo time," *i.e.*, neither on duty nor off duty time. FRA now seeks to reinterpret the HSA and reclassify this waiting time as on duty time, based on the

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[1] The Railroads have previously petitioned this Court for review of prior related Federal Railroad Administration actions in violation of the HSA and Administrative Procedure Act, *see Atchison, Topeka, and Santa Fe Railway Co., et al. v. Pena, et al.*, No. 93-1505 (filed Mar. 2, 1993); *Atchison, Topeka, and Santa Fe Railway Co., et al. v. Pena., et al.* No. 93-2378 (filed June 7, 1993). On June 24, 1993, the Court by its own motion consolidated these two appeals. The Railroads have filed a separate Motion to Consolidate this appeal with the pending appeals in Nos. 93-1505 and 93-2378.

United States Court of Appeals for the Ninth Circuit's decision in *United Transportation Union v. Skinner,* 975 F.2d 1421 (9th Cir. 1992) (*"UTU v. Skinner"*). Even though FRA disagrees with the Ninth Circuit's interpretation of the HSA, FRA, which was under no legal compulsion to do so, extended the Ninth Circuit interpretation to all railroads nationwide effective January 1, 1993.

In their Petition and Supplement to FRA, the Railroads pointed out that such waiting time had never before been considered on duty time under HSA; rather, it was considered off duty time or "limbo" time. The Railroads also demonstrated that FRA's interpretation was contrary to the established case law, legislative history, and longstanding past practice under HSA. FRA nonetheless concluded that the Petition and Supplement "provide no persuasive rationale for rescinding FRA's new interpretation." July 1 Decision at 2.

Despite the fact that FRA provided interested parties with notice and an opportunity to comment in 1976 prior to issuing its previous "interpretation" of "covered service" under HSA, which was effectively amended by the FRA's new interpretation, FRA claimed that it was not required to give notice and comment to the Railroads prior to adopting its new interpretation of the HSA. FRA maintained that its new interpretation is not a substantive or legislative rule within the meaning of the APA. Rather, FRA claimed that its new interpretation is an "interpretative rule" and statement of policy, which is exempt from APA's notice and comment requirements. In any event, FRA stated that its October 28, 1992 letter to the General Counsel of the Association of American Railroads satisfied any notice requirement it may have had. July 1 Decision at 3. Finally, in the July 1 Decision FRA admittedly extended its erroneous interpretation of the HSA beyond the scope of the Ninth Circuit's decision in *UTU v. Skinner.* July 1 Decision at 4-5 ("FRA tried to anticipate factual scenarios that may not have been squarely addressed in the Ninth Circuit's opinion. . . .

Even if [a train] crew gets off the train and walks to a nearby restaurant, the crew is still considered *on duty* until deadhead transportation arrives.") (emphasis in original).

Thus, in the July 1 Decision, FRA continued to interpret and apply HSA contrary to the prior, longstanding interpretation and application of the statute. FRA's July 1 Decision is arbitrary, capricious, and not in accordance with the law and contrary to the HSA. In addition, FRA's new position is not supported by any substantial evidence. Further, contrary to its claims in the July 1 Decision, FRA's new interpretation of HSA constitutes a substantive rule within the meaning of the APA, and it was therefore required to provide interested parties with notice and comment prior to implementing its new interpretation.

The Railroads request that this Court order the FRA to rescind nationwide application of its new interpretation of HSA, provide notice to the public of its new interpretation, and provide interested parties with an opportunity to comment. In the alternative, the Railroads ask this Court to interpret the HSA to provide that time spent waiting by a train crew which has been relieved from further duties is not on duty time under the HSA. Such an interpretation is required by the statute, its legislative history, and the longstanding application of the HSA in this manner.

Venue is proper in this Court pursuant to 28 U.S.C. § 2343, because Petitioner IC's principal office is located in Chicago, Illinois.

Respectfully submitted,

/s/ Mark V. Holden
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Attorneys for Petitioners

Dated: July 16, 1993

[Appendix A and Certificate of Service Omitted in Printing]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 93-1505, 93-2378, and 93-2712

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *et al.*,
Petitioners,

v.

FEDERICO PEÑA, *et al.*,
Respondents.

and

THE BROTHERHOOD OF LOCOMOTIVE ENGINEERS and UNITED TRANSPORTATION UNION,
Intervening Respondents.

CERTIFIED LIST OF DOCUMENTS COMPRISING THE ADMINISTRATIVE RECORD

In accordance with Rule 17 of the Federal Rules of Appellate Procedure, the undersigned, Pat McLaughlin, Docket Clerk of the Federal Railroad Administration (FRA), certifies the following to be a list of all documents, transcripts, exhibits and other materials comprising the administrative record in this matter:

(1) Letter from Lawrence M. Mann, Alper & Mann, to former FRA Associate Administrator for Safety, Joseph W. Walsh, inquiring as to how FRA has applied the Hours of Service Act to employees who are required by railroads to remain on a train after having been on duty for 12 continuous hours, dated 8/17/88.

(2) Letter from Gregory B. McBride, former FRA Assistant Chief Counsel for Safety, to Lawrence M. Mann, Alper & Mann, addressing how the Hours of Service Act applies to employees who are required by railroads to remain on a train after having been on duty for 12 continuous hours, dated 8/04/89.

(3) Final report by FRA's Office of Policy, No. 91-01, entitled "Issues in Locomotive Crew Management and Scheduling," dated 2/91.

(4) Report by the General Accounting Office to the Chairman, Committee on Energy and Commerce, U.S. House of Representatives, entitled "Railroad Safety: Engineer Work Shift Length and Schedule Variability," GAO/RCED 92-133, dated 4/10/92.

(5) Final report by FRA's Office of Research and Development, No. 92-17, entitled "Engineman Stress and Fatigue: Pilot Tests," dated 6/92.

(6) Decision of the United States Court of Appeals for the Ninth Circuit in *United Transportation Union* v. *Skinner*, 975 F.2d 1421 (9th Cir. 1992), dated 9/22/92.

(7) Motion For attorneys' fees in the amount of $22,309.89, and memorandum of points and authorities in support of request for attorneys' fees filed in the United States District Court for the District of Oregon by the Brotherhood of Locomotive Engineers, dated 10/21/92.

(8) Motion For attorneys' fees in the amount of $10,684.24, and memorandum of points and authorities in support of request for attorneys' fees, filed in the United States Court of Appeals for the Ninth Circuit by the Brotherhood of Locomotive Engineers, dated 10/21/92.

(9) Letter from S. Mark Lindsey, FRA Chief Counsel, to Robert W. Blanchette, Vice President-Law and General Counsel of the Association of American Railroads

(AAR), providing notice of the Ninth Circuit's decision and asking the AAR's cooperation in making known to its member railroads FRA's intention to enforce the court's decision nationwide beginning 1/1/93, dated 10/28/92.

(10) Letter from S. Mark Lindsey, FRA Chief Counsel, to Lawrence M. Mann, Alper & Mann, stating FRA's intention to enforce the Ninth Circuit's decision nationwide beginning 1/1/93, dated 10/28/92.

(11) Order by Circuit Judges Schroeder, Reinhardt, and Kleinfeld (with Judge Kleinfeld dissenting), United States Court of Appeals for the Ninth Circuit, granting the plaintiff's motion for attorneys' fees, dated 11/23/92.

(12) Operating Practices Bulletin No. 92-05, entitled "'Hypothetical Examples for the 'On-Duty Time' decision [sic] of the United States Court of Appeals for the Ninth Circuit," dated 12/2/92.

(13) "Supplemental Memorandum In Support Of Plaintiff's Motion For Attorneys Fees," filed in the United States District Court for the District of Oregon by the Brotherhood of Locomotive Engineers, dated 12/3/92.

(14) "Findings and Recommendation" by United States Magistrate Judge Juba, United States District Court for the District of Oregon, granting in part and denying in part plaintiff's motion for attorneys' fees, dated 12/15/92.

(15) "Request For Clarification Of Findings and Recommendation," filed by the Brotherhood of Locomotive Engineers, in the United States District Court for the District of Oregon, dated 12/22/92.

(16) Order by United States Magistrate Judge Juba, United States District Court for the District of Oregon, granting plaintiff's request for clarification, dated 1/6/93.

(17) Supplemental Judgment awarding plaintiff attorneys' fees in the amount of $22,216.14, United States District Court for the District of Oregon, dated 3/25/93.

(18) Petition for Interpretation of the Hours of Service Act by The Atchison, Topeka and Santa Fe Railway Company; Burlington Northern Railroad Company; Consolidated Rail Corporation; CSX Transportation, Inc.; Illinois Central Railroad Company; Norfolk Southern Railway Company; Norfolk and Western Railway Company; Southern Pacific Transportation Company; and Union Pacific Railroad Company to FRA, dated 3/26/93.

(19) Statement of agency policy and interpretation, entitled "Nationwide Applicability of a Decision of the United States Court of Appeals for the Ninth Circuit Concerning an Agency Interpretation of the Hours of Service Act; Miscellaneous Hours of Service Act Issues," as published in 58 Fed. Reg. 18,163, dated 4/8/93.

(20) Letter from Thomas C. Dorsey, Vice President & General Counsel, The American Shore Line Railroad Association, to S. Mark Lindsey, Acting Federal Railroad Administrator, expressing support for the 3/26/93 Petition, dated 4/23/93.

(21) Supplement to 3/26/93 Petition, dated 5/19/93.

(22) Letter from Grady C. Cothen, Jr., Acting Federal Railroad Administrator, to Ronald M. Johnson and Mark V. Holden, Akin, Gump, Strauss, Hauer & Feld, L.P.P., denying relief requested by petitioners' in their Petition and Supplement, dated 7/1/93.

/s/ David H. Kasminoff
for PAT MCLAUGHLIN
Docket Clerk
Federal Railroad
Administration

[Certificate of Service Omitted in Printing]